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88-1382

No.

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

Eagle-Picher Industries, Inc.,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

I. Whether a manufacturer of asbestos-containing thermal-insulation products under contract to the Puget Sound Naval Shipyard can state a third-party claim for contribution against the United States under the Federal Tort Claims Act where the underlying plaintiff is a federal shipyard worker injured by the Government's negligence as owner of the vessels on which the plaintiff was injured.

A. Whether a shipyard worker "engaged in maritime employment" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") must independently demonstrate some additional "nexus to traditional maritime activity" (of the sort required for admiralty jurisdiction under *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972)), in order to sue a negligent vessel owner under Section 5(b) of the LHWCA, 33 U.S.C. § 905(b) (1982), despite rulings to the contrary by this Court and by the courts of appeals for the Second, Fifth and Ninth Circuits.

B. Whether Eagle-Picher's third-party vessel-owner claims are barred by the exclusive-liability provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c).

II. Whether the United States may be sued under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1402, for breaches of warranties made and duties assumed in connection with its design and contractual procurement of asbestos-containing thermal-insulation products.

A. Whether a federal court of appeals may adopt factual "findings" from another case—involving different parties, different products and different contract specifications from those at bar—in order to affirm the summary dismissal of properly pleaded breach-of-contract claims.

B. Whether the Government's breach of its implied warranty of safety and suitability of contractually mandated military specifications is actionable under the Tucker Act.

C. Whether the Government's breach of its implied duty to reveal superior knowledge of matters affecting the cost and performance of military procurement contracts is actionable under the Tucker Act.

PARTIES TO THE PROCEEDINGS BELOW

The following parties participated in the proceeding before the United States Court of Appeals for the Federal Circuit:

Eagle-Picher Industries, Inc., *Defendant/Third-Party Plaintiff/Appellant*;

Raymark Industries, Inc., *Defendant/Third-Party Plaintiff/Appellant*; and

United States of America, *Third-Party Defendant/Appellee.*

The following additional persons and corporations were parties in the litigation before the United States District Court for the Western District of Washington, and may have an interest in the outcome of this proceeding:

Plaintiffs:

Albert Lopez and Shirley Lopez, husband and wife.

Defendants:

A.C. & S., Inc.; American Asbestos Textile Corp., a/k/a Amatex Corp.; Armstrong Cork, Inc., Asarco, Inc.; Carey Canada, Inc.; Celotex Corp., successor in interest to Philip Carey Manufacturing Co.; Philip Carey Corp.; Briggs Manufacturing Co.; and Panacon Corp.; Combustion Engineering Inc.; Crown Cork & Seal Co.; Fibreboard Corp.; Flintkote Co.; Forty-Eight Insulations, Inc.; GAF Corp.; successor by merger with Ruberoid Co.; Garlock, Inc.; Johns-Manville Sales Corp.; J.P. Stevens, Inc.; Keene Corp., successor by merger with Baldwin-Ehert-Hill a/k/a Asten Hill; Nicolet Industries; Owens-Corning Fiberglas Corp.; Owens-Illinois Corp.; Owens-Illinois Glass; Pittsburgh Corning Corp.; Raybestos-Manhattan; Southern Textile; Standard Asbestos; Union Asbestos & Rubber Co., a/k/a Unarco Industries, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Eagle-Picher Industries, Inc. ("Eagle-Picher"),[1] hereby seeks this Court's review, on a writ of certiorari, of the judgment entered in this case by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals below is reported as *Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), and is reproduced as Appendix A to this petition.

The opinion of the district court in this case is reported as *Lopez v. Johns-Manville*, 649 F. Supp. 149 (W.D. Wash. 1986), and is reproduced as Appendix B hereto.

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[1] Eagle-Picher is a publicly-held corporation. It has no parent company, affiliates or subsidiaries required to be listed pursuant to Rule 28.1 of the Rule of this Court.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1988. A copy of that judgment is reproduced as Appendix C to this petition. Eagle-Picher's timely petition for rehearing was denied by the court of appeals by order of November 21, 1988. A copy of that order is reproduced as Appendix D hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this litigation are the following:

1. The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1402;
2. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674;
3. Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1982);[2] and
4. The exclusive-liability provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c).

The texts of those statutory provisions are reproduced as Appendix E to this petition, pursuant to Rule 21.1(f) of the Rules of this Court.

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[2] Section 5(b) of the LHWCA—which provided that a maritime worker injured by the negligence of a vessel owner could sue the negligent vessel owner even if the vessel owner was his employer—was amended prospectively in 1984 to preclude such vessel-owner claims against an LHWCA-covered employer. *See* Longshoremen's and Harbor Workers Compensation Act Amendments of 1984, Public Law No. 98-426, § 5(a)(1), 98 Stat. 1641 (1984) (codified at 33 U.S.C. § 905(b) (1985)). That amendment has no application to the instant litigation. *See id.* § 28(c), 98 Stat. 1655 (codified at 33 U.S.C. § 901 note).

STATEMENT OF THE CASE

This action arises out of the federal government's procurement, use and misuse of asbestos-containing thermal-insulation products in connection with the construction and repair of Government-owned naval vessels at the Puget Sound Naval Shipyard ("PSNS") at Bremerton, Washington. It is but one of literally thousands of materially identical cases currently pending in the lower courts.[3]

This case involves an appeal transferred to the United States Court of Appeals for the Federal Circuit from the Ninth Circuit on the basis of this Court's ruling in *United States v. Hohri*, 482 U.S. 64 (1987). It illustrates the problems that arise when a reviewing court of previously limited jurisdiction is asked to deal with issues entirely outside its prior expertise, and where that court so badly misconstrues the appellate function in reviewing a district court's dismissal on a Rule 12(b) motion, Fed. R. Civ. P., that it misapplies the law and "finds" facts not on the record even as to those issues putatively within its area of expertise.

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[3] Beginning in the early 1930's and continuing into the 1970's, the United States specifically required, by contract and regulation, that all thermal-insulation products used aboard such vessels contain significant amounts of asbestos. It did so despite extensive and specific knowledge of the fact that occupational exposure to heavy concentrations of airborne asbestos dust posed a serious and immediate threat to the health of shipyard workers. For more than 40 years, the federal government (and, more particularly, the United States Navy) knowingly exposed tens of thousands of federal shipyard workers to unsafe concentrations of such dust, all the while (i) using the asbestos in a recklessly careless manner, (ii) refusing to implement the known and readily available safety precautions designed to minimize the dangers to which its workers were being exposed, and (iii) failing to warn its workers of the very serious dangers to which they were being exposed on a daily basis. This case arises out of the injuries inflicted upon one such worker, Albert Lopez, by the wrongful and negligent acts and omissions of his employer, the federal government.

On July 9, 1980, plaintiffs Albert and Shirley Lopez, husband and wife, filed suit against Eagle-Picher and approximately 20 other former manufacturers and suppliers of asbestos-containing insulation products. Mr. Lopez worked as a pipefitter, pipecoverer and insulator at PSNS from 1947 to 1984. App. at 22a. Mr. Lopez was employed by the United States, the owner of PSNS and of the vessels on which Mr. Lopez worked. Plaintiffs alleged that Mr. Lopez suffered personal injury as the result of having been exposed—throughout the course of his employment at PSNS—to asbestos and asbestos-containing products manufactured and/or sold by Eagle-Picher and/or by the other defendants below. In 1984, Eagle-Picher reasonably settled plaintiffs' claims against it for $10,000.00.

During the course of the proceedings in the district court, Eagle-Picher and three other defendants filed third-party complaints against the United States, the party which caused plaintiff Albert Lopez to have been exposed to asbestos throughout his 37-year employment at PSNS. By its third-party complaint, Eagle-Picher sought contribution and/or indemnification from the United States on the grounds that Mr. Lopez's injuries were directly and proximately caused solely by the wrongful and negligent acts and omissions of the United States. Specifically, Eagle-Picher asserted:

(i) Tort claims for contribution and/or noncontractual indemnification, based upon the Government's breach of duties of care imposed by state law;[4]

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[4] By its state-law claims, Eagle-Picher sought restitution from the United States on the basis of wrongful and negligent acts and omissions by the Government as plaintiff's employer at PSNS (Count III); as a Good Samaritan which undertook to protect the health and safety of the plaintiff and his co-workers (Count V); and for its failure to warn Eagle-Picher or the plaintiff of known

(ii) Tort claims for contribution based upon the Government's breach of duties imposed upon it, by federal law, as the owner of the vessels upon which Mr. Lopez was required to work at PSNS;[5] and

(iii) Contract claims based upon the Government's breach of warranties made in connection with the Navy's design and procurement of asbestos-containing products manufactured by Eagle-Picher in strict compliance with mandatory federal government contract specifications which *expressly required* the use of asbestos in such products.[6]

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dangers of asbestos use (Counts VI and VII). Those claims are asserted under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

[5] Among other things, federal law requires a vessel owner (i) to maintain his ship in a reasonably safe condition; (ii) to avoid exposing persons aboard the ship to hazards presented by areas or equipment within the control of the vessel owner; and (iii) to warn persons aboard the ship of any hidden dangers of which the vessel owner is aware. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 163 n.10, 165-67 & n.13 (1981); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-32 (1959). The United States is alleged here to have violated all of those duties. These claims, too, are brought under the FTCA.

[6] Eagle-Picher's contract claims are asserted under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1402. Its principal Tucker Act claim in this case alleges (i) that the asbestos-containing cement product which it manufactured and sold to the United States for use at the Puget Sound Naval Shipyard was manufactured and sold pursuant to and in strict compliance with mandatory government contract specifications which expressly required the use of asbestos therein; (ii) that the United States, by its establishment and contractual enforcement of these mandatory specifications, warranted the specifications for their feasibility and their safety; and (iii) that the Government breached that warranty by failing to establish specifications which were safe and which could be used in a safe manner. *See United States v. Spearin*, 248 U.S. 132 (1918); *USA Petroleum Corp v. United States*, 821 F.2d 622 (Fed. Cir. 1987); *Ordnance Research, Inc. v. United States*, 609 F.2d 462 (Ct. Cl. 1979).

Eagle-Picher's second Tucker Act claim seeks damages for the losses it suffered as the result of the Government's failure to dis-

On May 19, 1986, the district court dismissed all third-party claims against the United States for failure to state a cause of action under Rule 12(b), Fed. R. Civ. P. The district court ruled that all of Eagle-Picher's (and Raymark Industries, Inc.'s) FTCA claims—including, apparently, the manufacturers' federal vessel-owner claims—are governed by state law and therefore barred by the exclusive-liability provision of Washington State's workers' compensation statute, or, in the alternative, are barred by the exclusive-liability provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c).

The district court also ruled that, under the unprecedented decision of the Court of Appeals for the First Circuit in *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986), a maritime worker injured by the negligence of a vessel owner may not maintain a negligence action under Section 5(b) of the LHWCA, 33 U.S.C. § 905(b), unless he can independently demonstrate some additional "nexus to traditional maritime activity" beyond his shipboard maritime employment. The court took it upon itself to rule (incorrectly, and without evidence) that no such showing could be made here; that the underlying plaintiff here could not have asserted a Section 905(b) vessel-owner claim; and that Eagle-Picher's derivative vessel-owner claims must therefore be dismissed.

Furthermore, the district court ignored the allegations of Eagle-Pitcher's complaint on the novel ground that they were "self-serving" (App. 36a); and mischaracterized

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close extensive information, known to it but unknown to Eagle-Picher, concerning the health hazards of occupational exposure to asbestos. *See Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364 (Ct. Cl. 1972); *J.A. Jones Construction Co. v. United States*, 390 F.2d 886 (Ct. Cl. 1968); *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct .Cl. 1963).

Eagle-Picher's causes of action as relying on implied-in-law quasi-contracts, rather than on actual breaches of actual contracts.

Eagle-Picher appealed from the district court's decision to the Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1291. On motion by the Government, and over Eagle-Picher's objection, the appeal was transferred to the Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(2), as construed by this Court in *United States v. Hohri*, 482 U.S. 64 (1987).

The United States Court of Appeals for the Federal Circuit affirmed the district court's dismissal of all of Eagle-Picher's claims. In so doing, it compounded the errors of the lower court. Where, as noted above, the district court refused to accept as true the allegations of Eagle-Picher's complaint, the court of appeals went even further: The appellate court actually made dispositive findings of fact, adverse to Eagle-Picher, which "facts" had nothing whatsoever to do with Eagle-Picher, or its products, or the government contract specifications pursuant to which those products were manufactured.

In addressing Eagle-Picher's claim for the Government's breach of warranty implied in fact from its promulgation and express contractual enforcement of design specifications for the allegedly injury-causing asbestos-containing thermal-insulation cement,[7] the Court mistakenly ruled as a matter of *fact*—in contradiction of the express allegations of Eagle-Picher's complaint and in the absence of *any* supporting evidence of record—that the cement specifications in issue are *performance* specifications which do not give rise to warranties of the kind recognized in *Spearin, Ordnance Research,* and *USA Petroleum Corp. See* App. at 8a.[8]

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[7] *See United States v. Spearin*, 248 U.S. 132 (1918); *USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir. 1987); *Ordnance Research, Inc. v. United States*, 609 F.2d 462 (Ct. Cl. 1979).

In affirming the dismissal of Eagle-Picher's "superior knowledge" claim,[9] the court similarly made *factual* findings unsupported by *any* evidence whatsoever. App. at 12a.

The Federal Circuit's treatment of Eagle-Picher's FTCA claims can only be described as confused. *See* App. at 13a-20a. After discussing several different garbled versions of what the court apparently understood the parties to have argued, the court ultimately unthinkingly relied upon the First Circuit's rulings in *Drake v. Raymark Industries, Inc., supra,* and *In re All Maine Asbes-*

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[8] Insofar as Eagle-Picher's claims are concerned, the court of appeals was simply—but grossly—mistaken in its statement that "Judge McGovern has held the government asbestos specifications were performance specifications, and this holding is not appealed." App. at 8a. As explained below, Judge McGovern never considered the government specifications by which Eagle-Picher's (and one other manufacturer's) asbestos-containing *cement* was manufactured. The holding to which the Court of Appeals referred in its decision related to entirely different products (pipecovering, block and asbestos cloth) manufactured by the Pittsburgh-Corning Corporation, Fibreboard, Inc., and Raymark Industries, Inc., respectively. *See Lopez v. Johns-Manville,* 649 F. Supp. 149, 157 (W.D. Wash. 1986), App. at 35a-36a, *quoting Tefft v. A.C. & S., Inc.,* No. C84-154M (W.D. Wash. Oct. 12, 1984) (Order on Cross-Motions for Summary Judgment) (A copy of the *Tefft* decision is attached hereto as Appendix F).

Indeed, by the time Judge McGovern issued his decision in the *Tefft* case, all claims against Eagle-Picher had long since been dismissed voluntarily by the plaintiffs. *See Tefft v. Johns-Manville,* No. 84-154M (W.D. Wash. July 11, 1984) (Court Minute Order) (A copy of that order if submitted herewith as Appendix G).

[9] *See, e.g., American Ship Building Co. v. United States,* 654 F.2d 75 (Ct. Cl. 1981); *Hardeman-Monier-Hutcherson v. United States,* 458 F.2d 1364 (Ct. Cl. 1972); *J.A. Jones Construction Co. v. United States,* 390 F.2d 886 (Ct. Cl. 1968); *Helene Curtis Industries, Inc. v. United States,* 312 F.2d 774 (Ct. Cl. 1963).

tos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986), and held that Eagle-Picher's FTCA-based vessel-owner claims were properly dismissed for want of a demonstrated "nexus to traditional maritime activity" beyond the underlying plaintiff's shipboard maritime employment. As explained more fully below, that ruling conflicts with the ruling of this Court in *McCarthy v. The Bark Peking*, 459 U.S. 116 (1983), and with the rulings of the Courts of Appeals for the Second, Fifth and Ninth Circuits in *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982), *vacated and remanded*, 459 U.S. 1166 (1983), *on remand*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied, sub nom Avondale Shipyards v. Rosetti*, 474 U.S. 820 (1985); in *Perkins v. Marine Terminal Corp.*, 673 F.2d 1097 (9th Cir. 1982); and in *Cook v. Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

REASONS FOR GRANTING THE WRIT

The district court decision in this case ignored the well-established rule requiring courts to accept as true all well-pleaded factual allegations of a complaint for purposes of considering a motion to dismiss. The appellate court's decision went even further: That court mistakenly determined "facts" adverse to petitioner here that: (i) were neither on the record nor even reasonably inferrable from the record; and (ii) pertained to *other* manufacturers' products in *another* case but not to Eagle-Picher's products involved in *this* case.

Even if this case did not otherwise present important questions of general applicability regarding the United States' susceptibility to suit under the Tucker Act and its amenability to third-party causes of action under the FTCA, the lower courts' departures from the accepted and usual course of judicial proceedings are so extreme and so pronounced as to require the exercise of this Court's supervisory powers.

Substantively, this case presents two critically important issues of federal law which cry out for disposition by this Court.

First, the Federal Circuit's invocation of the admiralty jurisdictional standards articulated in *Executive Jet Aviation Co. v. City of Cleveland*, 409 U.S. 249 (1972), to thwart the ability of a maritime worker to maintain a vessel-owner action under Section 905(b) of the LHWCA flies in the face of this Court's rulings in *Director, Office of Worker's Compensation Program v. Perini North River Associates*, 459 U.S. 297 (1983), and in *McCarthy v. The Bark Peking*, 459 U.S. 1166 (1983), and irreconcilably conflicts with other decisions of the Courts of Appeals for the Second, Fifth and Ninth Circuits. *See* p. 9 *supra*; pp. 12-15 *infra*.

Second, it presents again an issue which—although treated to date with remarkable consistency at the district court level—has wreaked havoc among the courts of appeals. *Every* district court (other than the district court below) faced with these claims to date has ruled that Eagle-Picher (or similarly situated asbestos-product manufacturers) *may* sue the United States under the FTCA because a private shipyard employer/vessel-owner in exactly the same situation as presented here could be sued by a third party for losses arising out of injuries inflicted upon maritime workers as the result of vessel-owner negligence.[10]

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[10] *Johns-Manville Sales Corp. v. United States*, 622 F. Supp. 443 (N.D. Cal. 1985); *In re All [Hawaii] Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984), *reconsideration denied*, Nos. 79-0382, *et al.* (D. Hawaii Dec. 29, 1986) (Memorandum Order on Reconsideration and Certification); *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984); and *In re All Maine Asbestos Litigation (PNS Cases)*, 589 F. Supp. 1571 (D. Me. 1984), *aff'd in part, vacated in part*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). *See also Eagle-Picher Industries, Inc. v. United*

However, all three appellate courts (including the court below)[11] that have denied the viability of Eagle-Picher's third-party claims for contribution or indemnity against the United States have differed as to why, in their respective views, those claims should fail. In sharp contrast, the four district courts that initially ruled on the viability of those claims uniformly and correctly agreed, on essentially the same analysis, that Eagle-Picher stated a viable claim for third-party contribution or indemnity. *See* note 10 *supra.*[12] In the face of this uniform and well-reasoned body of law developed at the district court level, the three appellate decisions—including the Federal Circuit's decision at issue here—represent a hodgepodge of conflicting and sometimes mutually exclusive "rationales" that cannot stand up to even the most cursory examination. Only this Court can eliminate this pervasive appellate confusion and resolve this issue of nationwide import.

States, 657 F. Supp. 803 (E.D. Pa. 1987), *rev'd* 846 F.2d 888 (3d Cir.), *cert. denied,* 109 S. Ct. 490 (1988).

[11] This petition represents Eagle-Picher's third attempt to have the Court review appellate rulings that Eagle-Picher cannot state a viable claim under the FTCA for third-party contribution or indemnity against the United States, despite overwhelming evidence that the United States was primarily responsible for injuries to shipyard workers allegedly arising from shipyard exposure to asbestos-containing insulation materials. *See Eagle-Picher Industries, Inc. v. United States* 846 F.2d 888 (3d Cir.), *cert. denied,* 109 S. Ct. (1988); *In re All Maine Asbestos Litigation (PNS),* 772 F.2d 1023 (1st Cir. 1985), *cert. denied,* 476 U.S. 1126 (1986).

[12] All four courts held that (i) the United States is liable under the FTCA if an analogous private party—in these cases, a private shipyard employer/vessel-owner—would be liable for a claim by an injured employee for vessel-owner negligence; (ii) under *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 530-32 (1983), such a private shipyard employer/vessel owner would be liable for negligence of the vessel to his own employee notwithstanding any workers' compensation statute's exclusivity provision; and (iii) therefore, the United States would be similarly liable here. See pp. 16-18 *infra.*

I. THE FEDERAL CIRCUIT'S DISMISSAL OF EAGLE-PICHER'S FTCA CLAIMS FOR CONTRIBUTION RELIED ON AN INTERPRETATION OF SECTION 905(b) OF THE LHWCA AS TO WHICH THERE IS A SIGNIFICANT CONFLICT AMONG THE CIRCUITS AND WHICH IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

Under the FTCA, the United States is liable in tort, with certain exceptions not here relevant, "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674.[13] The Federal Circuit appeared to accept the fact that, under the FTCA, the United States' liability must therefore be measured by analogy to that of a similarly situated *private* shipyard employer/vessel-owner.[14] App. at 18a-19a. It ruled, however, that an analogous private shipyard employer would not be subject to suit by a shipyard employee for vessel-owner negligence under Section 905(b) of the LHWCA on the view that "Section 905(b) is not coextensive in its coverage of employees with those for whom the employer must obtain coverage under Section 903." App. at 17a. As support for this proposition, the Federal Circuit relied primarily on *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1011 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986), and *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). Those cases held that, in order to state a claim for negligence of a vessel under Section 905(b), an LHWCA-covered shipyard worker must additionally and independently satisfy the "maritime nexus" test of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). This view, apparently shared now by the First and Federal circuits, directly conflicts with the views of the Fifth, Second and Ninth Circuits. In *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub nom Avondale Shipyards v. Rosetti*, 474 U.S. 820 (1985), the Fifth Circuit expressly held that a maritime employee is entitled to bring a Section 905(b) cause of action for vessel-owner negligence so long as he satisfied the two-element "situs and status" tests; that is, so long as he shows that his injury occurred on navigable waters and that he was an LHWCA-covered employee.[15] In *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982), *vacated and remanded*, 459 U.S. 1166 (1983), *on remand*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984), the Second Circuit held initially that plaintiff, a land-based worker injured while painting the mast of a museum ship, could not maintain an action under Section 905(b) because he failed the LHWCA's "status" test since his work "bore no relationship to navigation or commerce on navigable waters." 676 F.2d at 46. This Court granted *certiorari* and summarily vacated that decision in light of *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983).[16] On remand, and on the basis of the Court's ruling in *Perini*, the Second Circuit held that plaintiff was indeed a "covered employee under the LHWCA," "engaged in maritime employment" under Section 902(3), and *therefore* entitled to "bring his action for damages under 33 U.S.C. § 905(b) (1976)." 716 F.2d at 132.

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[13] *See also* 28 U.S.C. § 1346(b): District courts have jurisdiction over tort claims against the United States "where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (Emphasis added.)

[14] To the extent the Court embraced this analysis, it was correct, as the plain statutory language of the FTCA requires and as numerous other courts have held. *See* pp. 16-17, *infra*.

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[15] In *Richendollar v. Diamond M Drilling Co.*, 819 F.2d 124 (5th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 331 (1987), the Fifth Circuit, in *dicta*, repudiated that portion of the *Hall* case that held the pre-*Executive Jet* test for a maritime tort to have been expressly codified in § 905(b). *See* 819 F.2d at 125-26.

However, *Hall* does not depend on any such legislative "codification" in reaching its conclusion that a showing of "situs" and "status" is sufficient to state a claim under § 905(b). The traditional maritime "nexus" is satisfied by that showing without more.

Richendollar's repudiation of one element of the *Hall* case is neither explained in the context of the facts of the case nor even related to those facts. *Richendollar* held only that a welder who was injured on a jack-up drilling rig under construction on land failed to state a viable vessel-owner claim under § 905(b) because the drilling rig was not a "vessel for purposes of martime jurisdiction." 819 F.2d at 125. This holding did not in any way undercut *Hall*'s principal thrust that no additional "maritime nexus" showing is required for an LHWCA-covered maritime employee injured in the course of his employment on board a vessel on navigable waters to state a Section 905(b) cause of action.

The Ninth Circuit has similarly held that a maritime worker's coverage under the LHWCA, qualifying him to meet the "status" test for maritime employment under § 902(3) of the LHWCA, is a "factor [that] alone constitutes a sufficient nexus to traditional maritime activity to create admiralty jurisdiction in this case." *Perkins v. Marine Terminal Corp.*, 673 F.2d 1097, 1101 (9th Cir. 1982). *See also Cook v. Exxon Shipping Co.*, 762 F.2d

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[16] In *Perini*, this Court refused to restrict coverage under the LHWCA by superimposing the *Executive Jet* jurisdictional concept of "nexus" upon the congressionally established "status" requirement of the LHWCA's definition of "maritime employment." The Court explained:

> Perini's reliance on *Executive Jet* is misplaced. . . .
>
> The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U.S. at 265, 266. . . . Although the term "maritime" occurs both in 28 U.S.C. § 1331(1) and in § 2(3) of the [LHWCA], these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades."

459 U.S. at 320 n.29. "In addition," the Court went on, "Churchill [like the injured maritime employees in *Drake* and *PNS* and like Mr. Lopez here], as a marine construction worker, was by no means 'fortuitously' on the water when he was injured." *Id.*

750 (9th Cir. 1985), *cert. denied,* 475 U.S. 1047 (1986), (upholding § 905(b) claim of widow of land-based ironworker killed in explosion while temporarily aboard vessel to make repairs).

The conflict among the circuits as to the "maritime nexus" required has substantial practical significance for many claimants other than third-party claimants such as petitioner Eagle-Picher. Whether or not an LHWCA-covered maritime worker, injured on board a vessel by the vessel owner's negligence while engaged in maritime employment, needs to demonstrate any "maritime nexus" *in addition to* what is already inherent in the above-described circumstances is an issue that will either bar or admit numerous claims under Section 905(b) of the LHWCA by injured maritime employees, and is bound to recur until resolved by the Court.

II. THE EFFECT, IF ANY, OF FECA'S EXCLUSIVE LIABILITY PROVISION ON THIRD-PARTY FTCA CLAIMS FOR CONTRIBUTION AGAINST THE UNITED STATES WHERE STATE LAW WOULD PERMIT CONTRIBUTION AGAINST A SIMILARLY SITUATED PRIVATE EMPLOYER IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THE COURT.

The appellate courts' confusion [17] about the central issue in this case is reflected in the Federal Circuit's statement that it—

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[17] *See* cases cited at notes 10 and 11, *supra*. The First Circuit reversed District Judge Gignoux's affirmance of Eagle-Picher's vessel-owner cause of action on the basis of its newly-imported "maritime nexus" requirement. The Third Circuit reversed District Judge Pollak's affirmance of Eagle-Picher's vessel-owner cause of action on the basis of its view that a federal employee could never state a cause of action for vessel-owner negligence under Section 905(b) of the LHWCA because federal employees are excluded from LHWCA coverage for *compensation* purposes. The Federal Circuit's decision below simply added to the confusion.

> was inclined to believe that a suit for indemnification or contribution for liabilities incurred to federal employees for their breathing of asbestos, is unconsented even when the LHWCA is read with the FTCA to refer to a private employer.

App. at 18a-19a. The Federal Circuit's "inclination" on this issue, arrived at without benefit of analysis or rationale, ignored not only prior precedent and petitioner's arguments, but also the arguments urged by the United States.

In successfully urging dismissal of identical state-law FTCA claims in Maine, Pennsylvania, Hawaii and California, the United States argued as follows: (i) The FTCA subjects the United States to tort liability "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); (ii) in determining whether the United States is subject to liability under the FTCA for contribution or indemnity, the court must look to the law that a Maine, Pennsylvania, Hawaii or California court would apply in analogous circumstances; (iii) in the instant situation, the analogous "private individual" is a private shipyard/vessel-owner in Maine, Pennsylvania, Hawaii or California; (iv) in the instant circumstances, a private shipyard would be immunized from third-party claims such as Eagle-Picher's *state-law claims* by virtue of the exclusive-liability provisions of the Maine, Pennsylvania, Hawaii and California workers' compensation statutes; and (v) the United States is therefore immune from such claims under the FTCA. In Maine, Pennsylvania, Hawaii and California, the district courts accepted the Government's "analogous liability" analysis, and dismissed the manufacturers' *state-law* claims accordingly.[18]

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[18] See cases cited at n.10, *supra*.

Those same courts also uniformly held, however, that *precisely* the *same analysis* required that Eagle-Picher's (and other manufacturers') *federal vessel-owner claims* against the United States *be upheld.* That conclusion was required, each court said, because a private shipyard/vessel-owner in Maine, Pennsylvania, Hawaii and California (the analogous private party identified by the Government in each case) *may* be sued under Section 5(b) of the federal LHWCA, 33 U.S.C. § 905(b), for negligence in its capacity as vessel-owner, even where the injured party is the vessel-owner's employee. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-32 (1983).[19]

Any holding—such as the Federal Circuit's—to the effect that FECA's exclusive-liability bar effectively precludes third-party contribution claims under the FTCA is in direct conflict with this Court's decision in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), which expressly rejected the Government's argument that the FECA provision was so "all-encompassing" as to bar even third-party claims.

The Federal Circuit's decision on this issue also raises important questions of federal employment law and of interpretation of the FTCA's mandate requiring the liability of the Government to be assessed with respect to the liability of the analogous "private individual." In holding that a federal employee cannot state a cause of action against his employer under federal law even where a similarly situated private employee could state such a cause of action against his employer under state law, the lower court broke new ground. Even if the court's holding were not so clearly inconsistent with both *Lockheed* and *Jones & Laughlin*, the issue presented, because of its importance and its implications for millions of federal employees, clearly merits review.

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[19] The FTCA's mandate—that the United States be treated "as a private individual under like circumstances"—requires that the United States be held accountable for its wrongful and negligent breach of those duties of care imposed upon it by federal law, such as the duties articulated by this Court in *Scindia Steam Navigation v. De Los Santos, supra,* note 5, 451 U.S. at 163 n.10, 165-67 & n.13.

III. THE FEDERAL CIRCUIT'S EXTRA-RECORD "FACT-FINDING" SO FAR TRANSCENDS THE LIMITS OF THE APPELLATE JUDICIAL FUNCTION AS TO REQUIRE THIS COURT'S REVIEW.

In the district court, Eagle-Picher properly alleged (i) that it had entered into a series of contracts with the United States; (ii) that the contracts mandated strict compliance by the contractor with detailed design specifications; (iii) that, by its promulgation and contractual enforcement of the specifications, the government warranted that compliance by the contractor with the specifications would be feasible and safe; (iv) that the contractor complied in every respect with the contract specifications; and (v) that the government breached its warranty of safety and suitability and the contractor suffered losses as a result of the breach. App. at 37a. These allegations, if proven, state a well-established "specification-warranty" claim under the Tucker Act, as repeatedly recognized by this Court, by the Federal Circuit and by the former United States Court of Claims. *E.g., United States v. Spearin*, 248 U.S. 132 (1918); *USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir. 1987); *Ordnance Research, Inc. v. United States*, 609 F.2d 462 (Ct. Cl. 1979).

The Federal Circuit effectively acknowledged that the complaint properly stated the elements of a specification warranty claim of the kind recognized in *Spearin, Ordnance Research*, and their progeny. App. at 6a-7a. Nonetheless, the court of appeals took it upon itself to conclude, as a matter of *fact*, that the mandatory and contractually enforced government specifications pursuant to which Eagle-Picher's cement product was manufactured and supplied were *performance* specifications, not *design* specifications, and therefore did not give rise to a "*Spearin*-type warranty." App. at 8a. That conclusion was procedurally inappropriate and substantively wrong.

The basis for the appellate court's mistaken conclusion was its obvious misunderstanding that, in the district court, "Judge McGovern ha[d] held the government asbestos specifications were performance specifications, and this holding is not appealed." App. at 8a.

In truth, Judge McGovern *never* considered or addressed the nature of the *cement* specifications pursuant to which *Eagle-Picher's* product was manufactured. To the contrary, in his decision below, Judge McGovern referred generally to "the manufacturers[']" previous assertion of the so-called "Government contract specification defense" in *another* case, and he quoted the decision in that *other* case as having concluded—

> that because the manufacturers had significant influence over the development of specifications, and because *certain specifications were performance specifications* which leave the details of manufacture to the manufacturer, the *Defendants PCC* [Pittsburgh-Corning Corporation], *Fibreboard,* and *Raymark* have failed to meet their burden on the element concerning who established the specifications. This element being dispositive of the defense, the Court need not address the remaining elements. Accordingly, sumary judgment must be granted in favor of the plaintiffs and denied as to the defendants.

App. at 35a-36a (emphasis added). Neither the specifications pursuant to which the Pittsburgh-Corning Corporation and Fibreboard, Inc., manufactured asbestos-containing *pipecovering* nor the specification pursuant to which Fibreboard manufactured asbestos-containing *block* mandated the inclusion of asbestos in the subject products. As for Raymark, Judge McGovern ruled that the company itself had so actively participated in the writing of its asbestos cloth specifications that the government could not be said to have controlled the product's design or content. He made no ruling—and did not even address—the specifications pursuant to which Eagle-Picher's *cement* product was made.

Had he done so, he would have found (i) that the specifications with which Eagle-Picher was required to comply in its manufacture of insulation cement specifically and expressly mandated the inclusion of asbestos as a principal ingredient; and (ii) Eagle-Picher did not participate in the specifications' promulgation.[20]

Clearly, the Federal Circuit went far out of its way to import into the record of this case extraneous and third-hand "evidence" from *another* case involving other manufacturers' *different* asbestos-containing products manufactured pursuant to *other* specifications. This glaring error as to what was in the record on appeal before it was the basis for the court's affirmance of the district court's dismissal of Eagle-Picher's specification-warranty claim.[21]

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[20] Navy Department, Bureau of Engineering Specification 32P5, promulgated in 1933, was the first military specification with which Eagle-Picher was required to comply. It expressly mandated that, "Cement . . . [s]hall be composed of a mixture of rock wool fiber, asbestos fiber, and plastic material which will cause cold setting when tempered with water. *At least 85 percent, by weight, shall be a mixture of rock wool and asbestos fiber.*" (Emphasis added.) The text of Specification 32P5 is reproduced, in its entirety, as Appendix H to this petition. *See* App. at 76a. Successor specifications to 32P5 similarly expressly required the inclusion of asbestos throughout the relevant period.

[21] The United States Claims Court has ruled, after a lengthy trial and based on a full factual record, that all of numerous specifications pursuant to which Johns-Manville Corp. manufactured various asbestos-containing products were "design specifications for purposes of the warranty of specifications." *See Johns-Manville Corp. v. United States*, 13 Cl. Ct. 72, 131 (1987), *vacated on other grounds*, 855 F.2d 1571 (1988). Among those specifications were the very

The Federal Circuit's heavy reliance on a dispositive factual finding not in the record before it expands the boundaries for appellate review beyond any hitherto recognized. It is well established that appellate review is confined to questions of law and to factual findings on the record before the reviewing court. *E.g.*, *Goland v. Central Intelligence Agency*, 607 F.2d 339, 367, 370 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *GHR Energy Corp. v. Crispin Co.*, 791 F.2d 1200, 1201-02 (5th Cir. 1986). Moreover, on a Rule 12(b) motion to dismiss, the factual record consists of the allegations of the complaint, liberally construed and accepted as true for purposes of the motion. *E.g.*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

By relying on extra-record "findings" that did not even relate to the specifications for Eagle-Picher's prod-

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same specifications pursuant to which Eagle-Picher manufactured its insulation cement. The Claims Court held:

> When a specification includes a compositional requirement, that portion is a design specification because it tells the manufacturer which materials must be used. *USA Petroleum Corp.*, 821 F.2d at 627. . . . When the contractor is left no discretion or choice in the materials to be used, the specification (or portions of it) is design-type.

Id. And that is precisely the nature of Eagle-Picher's specification warranty claim here. Moreover, ample prior precedent confirms that Eagle-Picher's specifications, prescribing in detail the materials to be employed, are "design" specifications, not "performance" specifications:

> [Design specifications] set forth in precise detail the materials to be employed. . . .
>
> [By contrast,] "performance" type specifications set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection.

J.L. Simmons Co. v. United States, 412 F.2d 1360, 1362 (Ct. Cl. 1969).

uct, the Federal Circuit so far overstepped the boundaries defining the role of an appellate court as to require this Court's rectification.

However, the lower court did not stop there. Having found facts not on the record before it once, the court utilized its misguided momentum to do so again, this time with respect to Eagle-Picher's *other* Tucker Act claim. That claim is based on the Government's breach of its obligation to disclose superior knowledge of matters affecting cost and performance of government contracts to its contractors. Although the lower court acknowledged the existence of ample prior authority for stating "superior knowledge" causes of action (App. at 11a), it improperly chose to reject, out of hand, the allegations set forth in Eagle-Picher's complaint. Stating generally that it "must presume that government officials acted in good faith," the Court took the further—and improper—step of concluding, as a matter of fact, that:

> Acting in good faith, they [the government officials involved] *could not have knowingly exposed their own employees to undue asbestos hazards.*

App. at 12a (emphasis added). That factual conclusion —founded upon a supposition with no evidentiary basis whatsoever in the record of this case—goes to the very heart of Eagle-Picher's "superior knowledge" claim here. And, improperly at this stage of the proceedings, it rejects out of hand the specific allegations of Eagle-Picher's third-party complaint that the Government *did* know of the dangers of asbestos and that it *did* knowingly expose its own workers to undue hazards.

Again, the court inappropriately assumed the role of fact finder, and permitted its own preconceived notions of "good faith" and governmental benevolence to obscure the legal standards which govern the case at this stage of the proceedings.

* * *

To the extent that the lower court purported to rule, as a matter of substantive law, that Eagle-Picher failed to state causes of action under the Tucker Act for (i) breach of the implied warranty of the safety and suitability of contract specifications mandating particular design features, and (ii) breach of the duty to disclose superior knowledge affecting the costs and performance of a contract, its holding has momentous implications for government contractors generally. Under the lower court's ruling, all who do business with the United States Government would effectively be required independently —and at their sole risk—to investigate, examine, question and refuse to obey putatively mandatory specifications requiring particular design features in government-procured products. If a contractor cannot state a cause of action for breach of contract under the Tucker Act in these circumstances, the government procurement process will be paralyzed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1989

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal Nos. 87-1543, 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,
Plaintiffs,
and

RAYMARK INDUSTRIES, INC. and
EAGLE-PICHER INDUSTRIES, INC.,
Defendants/Third-Party-
Plaintiffs/Appellants,

v.

A.C.&S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; the CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING, INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; the FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK, INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KENNE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWENS-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,
Defendants,

v.

UNITED STATES OF AMERICA,
Third-Party-Defendant/Appellee.

Sept. 28, 1988

Philip A. Talmadge, Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S., Seattle Wash., and Joe G. Hollingsworth, Spriggs, Bode & Hollingsworth, Washington, D.C., argued for defendants/third-party-plaintiffs/appellants. Allen R. Sakai, of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S., and Paul G. Gaston and Edward M. Fogarty, Spriggs, Bode & Hollingsworth, were on the brief, of counsel.

David S. Fishback, Sr. Trial Counsel, and H. Michael Semler, Department of Justice, Washington, D.C., argued for third-party-defendant/appellee. With them on the brief were Richard K. Willard, Asst. Atty. Gen., J. Patrick Glynn, Director, Harold J. Engel, Deputy Director, JoAnn J. Bordeaux, Asst. Director and Henry Miller, Trial Atty., Gene S. Anderson, U.S. Atty. and Joseph B. Cox, Jr., Asst. Director, Torts Branch, Civ. Div.

Robert M. Bruskin, James F.C. Worrall and Harvey G. Sherzer, Howrey & Simon, Washington, D.C., Dennis H. Markusson, Robert D. Batson, Nancy E. Stead, and Richard E. Maunier, Manville Corp., Denver, Colo., were on the brief, for amicus curiae Johns-Manville Sales Corp.

Paul A. Zevnik, Kaye, Scholer, Fierman, Hays and Handler, Washington, D.C., and Max Gitter and Stuart M. Cobert, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, were on the brief, for amicus curiae GAF Corp.

Before MARKEY, Chief Judge, RICH and ARCHER, Circuit Judges, and NICHOLS and BENNETT, Senior Circuit Judges.

NICHOLS, Senior Circuit Judge.

This is a test case,* appealed from the United States District Court for the Western District of Washington

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* The only parties on appeal are Raymark and Eagle-Picher.

(McGovern, C.J.), Civil Action C84-155M, representative of numerous claims by present or former workers at the Puget Sound Naval Shipyard (PSNS), or their widows, against companies which supplied to the United States Navy products for insulation on shipboard that contained asbestos. Lopez was a civilian pipe fitter, pipe coverer, and insulator at PSNS from 1947 to 1984. Of numerous defendants, Raymark and Eagle-Picher settled with Lopez for $7,200 and $10,000, respectively, for disabilities supposed to result from breathing airborne asbestos dust, presumably, for purposes of this case, from products supplied to PSNS by Raymark and Eagle-Picher. Lopez also received an award from his employer, the United States, under the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101-93, but pursuant to section 8132, was required to refund it. *See United States v. Lorenzetti*, 467 U.S. 167, 104 S.Ct. 2284, 81 L.Ed.2d 134 (1984). Raymark and Eagle-Picher joined the United States as a third-party defendant and seek to be indemnified or reimbursed, in whole or in part, for their settlement payments and litigation expenses.

Lopez originally filed his suit in state court, but defendants removed it to federal court (W.D. of Washington), on diversity. The asserted grounds of federal liability to Raymark and Eagle-Picher were the Tucker Act, 28 U.S.C. § 1346(a)(2), as to claims founded on contracts implied in fact, and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-80, as to claims sounding in tort. The government, having successfully invoked 5 U.S.C. § 8132 to shift its loss to Raymark and Eagle-Picher, naturally does not welcome their effort to shift it back under the above two statutes. Its motion to dismiss or for summary judgment elicited a judgment of dismissal by the district court, which is the decision the appeal requires us to review. It is reported as *Lopez v. Johns-Manville*, 649 F. Supp. 149 (W.D. Wash. 1986).

The appeal was originally filed with the Ninth Circuit, but is here because of the presence of Tucker Act claims and the rule of construction of 28 U.S.C. § 1295(a)(2) laid down in *United States v. Hohri*, 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987). *See In re All Asbestos Cases*, 849 F.2d 452 (9th Cir. 1988). The briefs were originally prepared for the Ninth Circuit and came here with the rest of the case. They were supplemented here. There are amicus briefs. We have carefully considered all briefs and heard oral argument on behalf of Raymark and Eagle-Picher separately. Our conclusion is that we affirm the judgment of the district court, though not in all respects on the same reasoning. As to the Tucker Act claims, we affirm primarily on the basis of our own case law as we are meant to be the primary or sole source of case law construing that act since our establishment. *United States v. One (1) 1979 Cadillac Coupe de Ville*, 833 F.2d 994, 997 (Fed. Cir. 1987). As to the Tort Claims Act claims, we look primarily to the law of the Ninth Circuit, since such claims are here only as pendants to other claims. *Molins PLC v. Quigg*, 837 F.2d 1064, 1066, 5 U.S.P.Q.2d 1526, 1527 (Fed. Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988).

Discussion

Tucker Act Jurisdiction

Since the statutory basis of our jurisdiction is the presence of Tucker Act claims under 28 U.S.C. § 1346(a)(2), we consider them first. The government, of course, purchased products containing asbestos under written contracts and purchase orders, but the case has proceeded in a partial vacuum so far as concerns the specific texts, and in view of the lapse of time, it may be impossible now to produce them all. Some are known. It is reasonable to suppose, and the district court did suppose, they specified what asbestos the purchased products should contain, as asbestos was the most effective insulating element, and its perils, that made its use so undesirable, were only beginning to be known at the time of Lopez's first employment. On the other hand, from the arguments on behalf of Raymark and Eagle-Picher, we assume it is not now contended that the contracts or purchase orders contained any written warranties to sellers; it would be surprising indeed to see express warranties running from the buyer to the seller, especially when their legality would have been in doubt, as the able district court supposed. We are considering implied warranties.

The theory is that in specifying asbestos, the government made an implied warranty to sellers that its own use of the products would not expose the sellers to unforeseen defective product liabilities to persons who might be injured by breathing clouds of asbestos dust, lethal as we now know such clouds to be.

The decision of the district court implies that a contract action on such a theory is simply not available to sellers to the government under the Tucker Act. If the decision does not rest on a broad range of possible factual assumptions, under the pleadings, it cannot be sustained.

The court quotes *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216 (9th Cir. 1974), which rejects the supposed liability of a buyer to a seller, not to use a dangerous substance in a manner to expose the seller to liability to the buyer's employees. The analysis, however, deals with tort law and that of contracts implied at law, while for Tucker Act jurisdiction the claimant must allege a contract obligation implied in fact. The Tucker Act, as the court correctly states, does not confer jurisdiction of claims against the United States on contracts, implied at law, they must be implied in fact. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 100 S.Ct. 647, 62 L.Ed.2d 614 (1980); *Merritt v. United States*, 267 U.S. 338, 45 S.Ct. 278, 69 L.Ed. 643 (1925).

The asbestos suppliers, in the numerous cases now pending which seek indemnity from the United States against their liability to United States employees, frequently mention two cases that were brought under the Tucker Act, and do enforce warranty contracts implied in fact, running from buyer to seller. We will add a third, and there are others.

The first and most famous is *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918). Spearin had contracted to build a drydock at a navy yard (as Naval shipyards used to be called). The government, according to its custom, required construction contractors to build according to very detailed plans and specifications. Spearin was required to relocate a sewer according to plan, but the plan was defective in that it required Spearin to make the sewer, as relocated, discharge into another sewer which, as the plan failed to show, was itself blocked. The result was disaster. The Court (Brandeis, J.), said 248 U.S. at 136, 39 S.Ct. at 61:

> But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

And, 248 U.S. at 137, 39 S.Ct. at 61:

> But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. [Footnotes omitted.]

The case establishes a principle of broad application, but it is obvious a construction contract, with its massive detail all prescribed by the owner, supports a fact implication in a way a mere supply contract could hardly ever do, except one which exacts a like conformity to the buyer's prescription of detail. One which did is also frequently cited: *Ordnance Research, Inc. v. United States*, 221 Ct.Cl. 641, 609 F.2d 462 (1979). The contract was for production of igniters for fire bombs. This involved blending some very volatile explosives. The government had experience making these igniters; the plaintiff had none. The government provided very detailed specifications how to do it, but they were defective and in following them, plaintiff experienced a series of disastrous explosions with loss of life. The court held the government warranted—as we have seen, by an implication of fact—that if its instructions were followed, safe blending could be achieved. The specifications were in fact defective and in breach of the warranty.

In *USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir. 1987), the government contracted for several deliveries of petroleum by the vendor. It required that it determine the quantity delivered by each tanker load according to measurement means it provided. The means were defective and overpayments ensued which the contractor passed on to its suppliers and could not recover, yet the government demanded refund of its overpayments when the defects were at length discovered. It was not a very difficult deduction of fact, that in exacting use of its measurement means, the government impliedly warranted that its measurements means were correct.

It was characteristic of these cases that the circumstances strongly supported a factual inference that a warranty was implied. The counsel for asbestos suppliers here seem to think it is enough for a *Spearin* warranty that the government specified any characteristic at all in the merchandise it purchased. They do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-Picher, or if they did, whether the difference related to the asbestos content of the material supplied. We know, as a matter of judicial notice today, that all insulating material containing asbestos is hazardous, that supplied to government and private customers alike. We can assume this was not so well known when the material was ordered. Even in a "reverse warranty" claim by an asbestos supplier against a private company, where the concept of implied warranty is not confined to implied in fact cases, it has been held the alleged warranty cannot be implied. *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981).

This court has held that a *Spearin*-type warranty is implied only in design specifications, not performance specifications. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1583 (Fed. Cir. 1987). It is not explained how any supposititious specifications for asbestos-containing insulating material could have been of the design type. Judge McGovern has held the government asbestos specifications were performance specifications, and this holding is not appealed. When a construction contract is not involved, as in *Ordnance Research*, some other provision telling just how to do the job, takes the place of literal design. The contractor has a right to rely on an "indicated method of manufacturing the end product." *Natus Corp. v. United States*, 178 Ct.Cl. 1, 371 F.2d 450, 455 (1967). It is not shown how the government could have supposed it needed to tell Raymark and Eagle-Picher how to make asbestos insulation, or how they needed to rely on such instructions.

In the absence of allegation or showing of circumstances requiring a conclusion that a *Spearin* warranty was implied, the asserted warranty would be, if it had judicial approval, implied at law, not fact, and a Tucker Act court would lack jurisdiction to imply it. As a matter of an implication of fact, an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances. It would be just as reasonable for the parties to the sale to have implied a warranty by the seller, that apart from dangers the seller warned of, the insulation would not endanger the buyer or its employees. Either way it would be a warranty implied in law, not fact.

The Anti-Deficiency Act

The district court also relied on the Anti-Deficiency Act, 31 U.S.C. § 1341, which provides that no government official may make or authorize an expenditure in excess of an available appropriation, or make a contract obligating money before an appropriation is made unless authorized by law. The reasoning of the court is that an express warranty to suppliers of asbestos products, of the kind asserted, would be illegal, and therefore an implied warranty must be so too. We have doubts about this, and as we need not rely on it, we do not do so. An express warranty would be a thing of value in addition to the purchase price. The contracting officer could pay money out if he found the warranty required it. On the other hand, a *Spearin*-type implied warranty is, if breached, enforceable only in the courts. At times, as in *Ordnance Research, supra*, it is enforceable under contract changes articles and no breach of the contract necessarily occurs, but if a contracting officer were going to issue a change order settling a claim, he would be limited to appropriated funds then available. However, appeal boards by the Contract Disputes Act of 1978, 41 U.S.C. § 607(e), can grant any relief the Claims Court could grant, *i.e.*, including damages in breach cases. There is a standing appropriation to pay court judgments and appeal board awards, 31 U.S.C. § 1304, so courts and boards, in rendering judgment, are not required to investigate whether program funds are available. In the circumstances, we are reluctant to found our holding on the Anti-Deficiency Act, and to do so would severely hamper the enforcement of *Spearin*-type warranties in the courts. Our appreciation of the bizarre and novel nature of the "reverse warranty" here asserted, and its lack of support in the alleged facts or the court decisions, does not require recourse to the Anti-Deficiency Act to persuade us that the Tucker Act does not provide means to enforce the alleged warranty here. If implied at all, it is not implied in fact. Raymark and Eagle-Picher have not stated claims on which relief can be granted.

Special Relationship

Raymark and Eagle-Picher have, in this case, kept discussing an alleged "special relationship," *i.e.*, certain special circumstances whose alleged existence fixes government liability. We must not forget, however, that absent an effective consent to be sued, the United States cannot be made a defendant, third party, or otherwise, in any court. The consents we operate under here are the Tucker Act and the FTCA. No others are alleged. The grievance seems to be in real terms that the United States knew more about the hazards of asbestos than it ever disclosed to its suppliers. If, supposedly, they had known all the government knew, they would have gone out of the asbestos business at once, and saved themselves untold liability, or else would have purchased all the insurance available and passed the cost on to the United States and other customers in sharply higher prices.

On motion to dismiss or for summary judgment, we may have to suppress our wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation. We must assume the government did know things it did not reveal, and that it used a defective product in ways that added to the hazard, but were not known to suppliers. We must also disregard the results of actual trials which have dealt with this imputation, as they are not part of the present record.

So far as this contention asserts an implied warranty, it is dealt with already in our section, *supra*. There is, also, case authority under the Tucker Act applying a different but related theory. Under these cases, nondisclosure to a bidder at the time of his bid of information essential to successful performance of the construction is treated at times as a breach. Examples are *Hardeman-Monier-Hutcherson v. United States*, 198 Ct.Cl. 472, 458 F.2d 1364 (1972); *J.A. Jones Constr. Co. v. United States*, 182 Ct.Cl. 615, 390 F.2d 886 (1968); *Helene Curtis Industries, Inc. v. United States*, 160 Ct.Cl. 437, 312 F.2d 774 (1963). In *American Ship Bldg. Co. v. United States*, 228 Ct.Cl. 220, 654 F.2d 75 (1981), the court set limits on the scope of breach liability for nondisclosure of superior knowledge. It held the doctrine is generally applied when a contractor (1) undertakes to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. Since the government is entitled to presume that one who bids on a government invitation knows his own capabilities and has ascertained he will be able to produce, and at what cost, it would be up to the contractor, complaining of a breach by nondisclosure, to produce specific information to back up his contention.

The government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government. They would after all not be held liable to pay anything on any asbestos or lung cancer claims if they had not marketed a defective product. They say the buyer owed them a duty to tell them their product was defective, intrinsically or as actually used. Such a contention is new to the "superior knowledge" doctrine and does not fit it at all well. It does not deal, for example, with how the government is supposed to know the supplier of asbestos needs information about asbestos it does not have. Surely a statement by a supplier to the government when the material was delivered would have attracted notice and would not have been forgotten. We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith, they could not have knowingly exposed their own employees to undue asbestos hazards. Maybe they had a duty to know more than they did, *e.g.*, to follow up clues to danger they actually had received. Raymark and Eagle-Picher have asserted then, not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he does not already know. This does not fit the superior knowledge doctrine and cases exactly like a glove. Then there is the question what the contract specifications actually said that misled the contractor.

We think the case law dealing with a government breach of a contract by non-disclosure of superior knowledge cannot be made to support the claims here in suit without so drastic a restructuring that we would be engaging in judicial legislation. We note that the Supreme Court has recently considered the plight of a government contractor exposed to liability to third persons from manufacturing defective products to government specifications. *Boyle v. United Technologies Corp.*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The Court extends the government's immunity to the contractor under carefully limited conditions in what is called the "government contractor defense." Before us the effort is to reduce the government's immunity and it appears logically inconsistent with the Supreme Court's approach. If the appellants Raymark and Eagle-Picher were really markedly exposed to Lopez and his future claims, and so many other claimants, by reason of conforming to government specifications and, if the otherwise carefully prescribed conditions are met, there should be no damage awards on which to base claims for government indemnity or contribution. There then is a conflict of logic between the government contractor defense and the logic on which the third party alleged liability of the government here is based. This is a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on case law as known hitherto. We are not to be understood as saying the government contractor defenses ought to have defeated Lopez's claim. No such issue is before us and we do not pass upon it. Judge McGovern has held the contrary, chiefly on the ground the involved specifications displayed before him were performance, not design specifications.

Federal Tort Claims Act

The district court also gave careful consideration to the Federal Tort Claims Act, which at 28 U.S.C. § 2674, makes the United States liable respecting tort claims to the same extent as a private individual under like circumstances. By 28 U.S.C. § 1346(b), the circumstances must be that the supposititious private individual "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951), it has been settled that in a private tort case, a person may bring in the United States as third-party defendant for indemnity or contribution if the United States was wholly or in part at fault. As there has been no trial, the fault of the United States has not been determined, but a problem here is, assuming it was at fault, Lopez was one of its employees and it is provided by FECA, 5 U.S.C. § 8116(c), that the liability of the United States under that act to the injured employee or his legal representative, spouse, dependants, etc., shall be exclusive of all other liability to such claimants "in a direct judicial proceeding."

The United States, as already stated, has recovered its compensation paid to Lopez because of his other recoveries, but this is not of legal importance. In *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), the Supreme Court held that Lockheed, having been sued by the administrator of a deceased federal employee compensated under FECA, could implead the United States as a third-party defendant, and was not barred by section 8116(c). The result on remand would depend on the validity of the "underlying substantive claim," and was not decided. The district court and the parties assume that *Lockheed* does not make the United States liable in this case on the underlying claim, and that will depend on how one identifies the private individual and what local law prescribes as to his liability. As to that, there are three theories that, (1) judge-made admiralty law will govern, (2) Lopez was a maritime worker and the liability would be that of a "negligent shipowner" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 and ff (LHWCA), because local law would have to step aside even though the injury was suffered in the State of Washington, and (3) the LHWCA does not apply and local Washington worker's compensation law will determine liability, because Lopez was not a maritime worker.

These issues are not confided to us, as Tucker Act claims are, as the intended sole source of appellate law, and as stated we look for guidance to Ninth Circuit case law, but such law does not take us to the end of our task.

Before *Hohri*, the parties elaborately briefed this case, and at impressive length, for the Ninth Circuit, whose tolerance for prolixity they must consider to surpass ours. They must have supposed, and by their arguments and citations obviously did suppose, that the Ninth Circuit would be unable to find guidance in its own precedents. Under the circumstances, we must try to determine what the Ninth Circuit would have decided.

(1) Theory 1 is that product liability can be asserted on behalf of a pipe fitter against a producer of unsafe asbestos products under traditional judge-made admiralty law, if the pipe fitter was building or repairing vessels on navigable waters. Presumably the manufacturer could then pursue indemnity from the United States under the *Lockheed* doctrine, and section 8116(a) would not suffice for a defense, so far as the vessels were government owned. This theory fails at its first step, however, in the Ninth Circuit, which in two carefully considered decisions has held that admiralty jurisdiction is wanting (a) over new vessel construction, because new construction is traditionally nonmaritime and not subject to admiralty law, *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983), and (b) over vessel repair, so far as concerns product liability to a pipe fitter, at least, because to distinguish between the same pipe fitter's work over the years between his work on new vessels, and on repair, would be "a mechanical analysis" (and besides, one would think an unpracticable distinction to draw as a factual matter). *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984). The court relies on *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), as authority to reject mere location on the water as a test of maritime activity and to consider also the nature of the work the pipe fitter performs. Of course, in an office building it would be little different. The pipe fitter is not a seaman, nor does he do work traditionally done by

seamen. The United States was not a party to those cases, so there is no question as to the jurisdiction of the Ninth Circuit to render the decisions. Authority from other circuits is not needed by us, but the Ninth Circuit itself cites *Harville v. Johns-Manville Corp.*, 731 F.2d 775 (11th Cir. 1984), in which a still more elaborate analysis may be found. *See also Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 8 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983) ("where a group is composed of workers with and without maritime status [pipe fitters] Admiralty jurisdiction does not exist as to the group." *Id.* at 844.) The Ninth Circuit has not taken this stand alone, and we have found no authority to the contrary, except *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). This decision, however, is followed by *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981), which denies the asbestos manufacturers indemnity for their tort liability from the shipyard involved, the Newport News Shipbuilding and Drydock Co., and thus they cannot invoke the Fourth Circuit for more than the first step where they need a second to be in a good position in this court. If our view matters, we agree with the Ninth Circuit that the first step fails: the pipe fitter's claim is not maritime whether he worked on new construction or repair of vessels.

(2) The LHWCA is a sweeping piece of legislation which, as amended in 1972, does two things—first, it requires that employers of certain maritime and harbor workers, including those employed in "repairing or building a vessel" obtain insurance to protect their workers against disability or death incurred in course of employment, payable without fault (sections 903-904). An employer who fails to do this is liable under section 905(a) in law or admiralty and is denied several defenses. None

of this applies directly to United States Government employees, such as Lopez, who have coverage under other law. Under section 905(b), in case of the "negligence of a vessel," the vessel may also be sued, the employer is not liable to the vessel, and the vessel's former absolute liability under "warranty of seaworthiness" is eliminated.

The asbestos manufacturer's argument is that Lopez worked for the United States in its capacity as a shipowner, and that a negligent private party, a shipowner, is the analogous private person whose liability is to be determined by the "law of the place" of 28 U.S.C. § 1346(b), the "law of the place" not being law of the State of Washington, where the Puget Sound Naval Shipyard is located, but the LHWCA. While the United States is not directly liable to its own civilian employees if injured on its vessels because of 5 U.S.C. § 8116(c), pursuant to the *Lockheed* doctrine it is liable for contribution on account of its own negligence if its employees are able to enforce liability against third persons for their injuries. According to this theory, recourse to state law is preempted because federal law, the LHWCA, covers the case.

There are numerous conceptual difficulties with this position. The hardest to overcome is, in our view, that section 905(b) is not coextensive in its coverage of employees with those for whom the employer must obtain coverage under section 903. Under that law, those engaged in shipbuilding are covered and must be insured. However, eligibility for worker's compensation under section 903 is not the same as and may be broader than, general maritime jurisdiction. *Rohde v. Southeastern Maritime Drilling Co.*, 667 F.2d 1215 (5th Cir. 1982). Negligence claims under section 905(b), are those covered by federal maritime principles. *Richendollar v. Diamond M. Drilling Co.*, 819 F.2d 125 (5th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987); *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1011 (1st Cir. 1985). If there was no intention to broaden the coverage of the judge-made admiralty law concerning vessel "unseaworthiness," and we perceive none in the act, then all the regional circuit cases holding that suits by shipyard pipe fitters for asbestosis do not lie under admiralty principles, likewise preclude indemnity liability under section 905(b). The purpose of section 905(b) is shown in *Drake* to have been to lessen the vessel's liability for unseaworthiness as a matter of strict liability and to restrict such liability to cases of negligence. Accordingly, the First Circuit has followed its own *Drake* decision with *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986), which deals with asbestos claims of federal employees, civil servants, rising out of their employment at the Portsmouth Naval Shipyard. These claimants are, legally, identically situated with Lopez's claim.

The First Circuit passes over, as can we, whether an unequivocal consent to liability of the United States is expressed with respect to indemnification or contribution against claims by federal workers, where the LHWCA itself provides in 33 U.S.C. § 903(b) [§ 902(a)(2) before 1984]:

> No compensation shall be payable in respect to the disability or death of an officer or employee of the United States or any agency thereof.

As to this, we meet ourselves coming back as appellant refers us, of course, to the case of the private shipowner postulated under the FTCA whose employees are not federal employees. But if consent to indemnification claims is granted at all, under these circumstances, it is surely not granted unequivocally. *Cf. United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953-954, 47 L.Ed.2d 114 (1976). We are inclined to believe that a suit for indemnification or contribution for liabilities incurred to federal employees for their breathing of asbestos, is unconsented even when the LHWCA is read with the FTCA to refer to a private employer.

In *Amell v. United States,* 384 U.S. 158, 163, 86 S.Ct. 1384, 1387, 16 L.Ed.2d 445 (1966), it is held respecting pay claims of *seamen* who are civil servants employed on government-owned noncombat vessels, that Congress thought of them as government employees who happened to be seamen rather than as seamen who by chance worked for the government. The traditional exclusive admiralty jurisdiction of seamens' wage claims did not extend to them; they could sue under the Tucker Act like other civil servants. Accordingly, it would seem that Lopez was a civil servant rather than a longshore and harbor worker, for purposes of statutory coverage, that is, the occasional situs of his work on shipboard does not establish LHWCA coverage.

We believe the Ninth Circuit would so hold, in view of its first step, respecting traditional admiralty coverage of pipe fitters working in shipyards, *supra.*

(3) If fededal maritime jurisdiction fails, whether derived from judge-made admiralty law, or from the LHWCA, we agree with the trial court that one must look to the law of the State of Washington to determine whether

> the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Under that law, the trial court convincingly shows that, absent any express contract commitment, an employer who carried appropriate workmen's compensation insurance would not be liable to indemnify third parties who were obliged to pay damages to the worker for having negligently caused or contributed to his injury. We need not add anything to his able analysis and citations.

We believe, moreover, the Ninth Circuit would extend to Judge McGovern's decision the customary deference when it is a matter of a United States District Judge construing the law of his home state. Of course, in case of any contract commitment, the result might be different, but then we have a case not sounding in tort, and it is the FTCA we are now construing.

Conclusion

Since the defendant/appellants, Raymark and Eagle-Picher, are unable to state a cause of action under either the Tucker Act or the FTCA against the United States as third-party defendant for indemnity or contribution, the decision of the United States District Court for the Western District of Washington must be affirmed, and the United States dismissed as a party to the action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. WASHINGTON

No. C84 155M

ALBERT LOPEZ, SHIRLEY LOPEZ, husband and wife,

v.

JOHNS MANVILLE, AMATEX, UNARCO, RAYMARK INDUSTRIES, FIBREBOARD CORPORATION, PITTSBURGH CORNING, OWENS ILLINOIS, OWENS CORNING FIBERGLAS, CELOTEX, KEENE CORPORATION

v.

USA

May 19, 1986

Truman R. Castle, Seattle, Wash., for plaintiffs.

Richard Hilfer, Bangs, Castle, Schnautz & Hilfer, P.S., Carney, Stephenson, Badley, Smith, Mueller & Spillman, Eileen Concannon, Garvey, Schubert, Adams & Barer, Patrick Sheldon, Karr, Tuttle, Koch, Campbell, Mawer & Morrow & Sax, Paul Gibbs, Williams, Lanza & Gibbs, Jon Hunt, Stafford, Frey & Mertel, James Murphy, Michael McKay, McKay & Gaitan, Charles Moren, Moren Lageschulte & Cornell, Seattle, Wash., Richard Feldman, Rivkin, Leff, Sherman & Radler, Garden City, N.Y., for defendants.

H. Michael Semler, JoAnn Bordeaux, Torts Div., U.S. Dept. of Justice, Washington, D.C., Chris Pickrell, Asst. U.S. Atty., Seattle, Wash., for U.S.

ORDER GRANTING MOTION OF UNITED STATES FOR DISMISSAL

McGOVERN Chief Judge.

INTRODUCTION

The United States moves to dismiss the third-party claims of Raymark Industries, Inc. and Eagle-Picher Industries, Inc. or for summary judgment. This case, and eighteen others in which the United States is a third-party defendant, arises out of asbestos exposure at Puget Sound Naval Shipyard (PSNS); both manufacturers who have brought third-party claims in Washington are involved in this case, and all major legal issues are raised.

Plaintiff Albert Lopez, was a civilian pipefitter, pipecoverer, and insulator at PSNS from 1947 to 1984 and was covered by the provisions of the Federal Employees Compensation Act (FECA) 5 U.S.C. § 8101-8193. Plaintiff has received FECA benefits, but following Plaintiffs' settlements with manufacturers, the United States has recovered from him (after his deduction of costs, reasonable attorney fees, and an amount equal to 20% of the remainder) all sums it paid pursuant to FECA, as required by 5 U.S.C. § 8132.[1] Plaintiff will become eligible for additional FECA payments should his medical expenses ever exceed the amount recovered from the manufacturers.

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[1] The purposes for this requirement of reimbursement are (1) to prevent an employee from recovering twice for the same injury and (2) to keep the fund solvent and to minimize the cost of the program. *Lorenzetti v. United States*, 710 F.2d 982 (3rd Cir. 1983). Moreover, the Supreme Court, ruling unanimously in *Lorenzetti* on appeal, held that the plain meaning of the statute entitles the United States to reimbursement under § 8132 regardless of whether the award or settlement in satisfaction of the third-party liability is for losses other than medical expenses or lost wages. *United States v. Lorenzetti*, 467 U.S. 167, 104 S.Ct. 2284, 81 L.Ed.2d 134 (1984).

Plaintiffs filed suit against approximately 20 manufacturers and suppliers of abestos-containing products. The complaint was settled as to all manufacturers except those in bankruptcy. Meanwhile, the third-party complaints were filed. Other manufacturers dismissed their third-party claims, but Raymark and Eagle-Picher seek to recover the respective settlement amounts of $7,200 and $10,000, plus associated fees and costs. The manufacturers assert claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680; the Tucker Act (contract claims), 28 U.S.C. §§ 1346(a)(2), 1402; and in admiralty.

DISCUSSION

A. Federal Tort Claims Act

The United States has waived sovereign immunity respecting tort claims in the Federal Tort Claims Act (FTCA) at 28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, ...

This waiver extends to third-party claims against the Government. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951).

The FTCA confers the federal courts with exclusive jurisdiction over

> civil actions on claims against the United States . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while

> acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Another statute is relevant to consider in this case. A provision of the Federal Employees' Compensation Act (FECA) limits the Government's liability to employees who have received compensation under the act. 5 U.S.C. § 8116(c). This section provides in pertinent part as follows:

> (c) The liability of the United States or an instrumentality thereof under this subchapter [5 USCS §§ 8101-8193] or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . .

Thus, in return for paying benefits to injured Government employees regardless of fault, the Government is immunized from further tort liability.

1. *Effect of FECA on Third-Party Indemnity/Contribution Claims*

Eagle-Picher and Raymark argue that *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983) further extends the FICA waiver of sovereign immunity from tort liability to third-party claims arising out of injuries to federal employees covered by FECA.

The Government contends that *Lockheed* does not so extend the FTCA waiver of immunity, did not confer an indemnity/contribution action upon third parties, and that although the FECA may not directly bar such suits, the Supreme Court recognized the possibility that the underlying substantive law might. The Court in *Lockheed* stated in its holding:

> The District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in *Weyerhaeuser*, and hold only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States.

Id. at 199, 103 S.Ct. at 1039. The Court reasoned that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), governs only the rights of employees, their relatives, and people claiming through or on behalf of them—these being the only parties benefiting from the *quid pro quo* compromise of FECA—and that Congress has not modified this provision to include third parties. *Id.* at 193-199, 103 S.Ct. at 1036-39.

The dissenting opinion in *Lockheed* is of interest here because the ideas elucidated therein echo important concerns at the heart of the issues at bar. In his dissent, Justice Rehnquist distinguished earlier cases relied on by the majority where the balance struck between competing policies favored rights to recovery based on "the special relationship between the third party and the employer created by ancient maritime law or by voluntary agreement." *Id.* at 201, 103 S.Ct. at 1040. The only relationship that Lockheed could claim, however, continued

Justice Rehnquist, was one based on the Government's breach of duty of care owed its employee. Thus, Lockheed's case involves an indirect sharing of responsibility among wrongdoers rather than a breach of direct duty owed Lockheed. *Id.* at 202, 103 S.Ct. at 1040-41. Therefore, concluded Justice Rehnquist,

> For these reasons, I am convinced that we should retain the balance our earlier decisions would require. Where a third party has a direct action against the Government that fits into the same category as the claims we have allowed in the past, it may include a claim for damages it has paid to a Government employee. But where the third party's claim is an indirect action based on contribution or indemnity, Congress' clear intent to limit the liability of the United States should prevail.

Id. at 203, 103 S.Ct. at 1041.

Justice Rehnquist reached his conclusion by taking a broader, policy oriented perspective, and would find FECA's limitation provision waived for third-party suits only where there existed a special relationship creating direct duties. Although Eagle Picher and Raymark assert that the Government breached independent duties owed them, this claim need not be addressed here in view of *Lockheed's* majority holding. For now, *Lockheed* will permit a third-party suit for contribution, FECA provisions creating no bar. There remains the question of whether the governing substantive law provides Eagle-Picher and Raymark with a right to indemnity.

2. *Washington Law Applies*

a. *The Joint Tortfeasor Requirement*

The FTCA requires that the court apply the law of the state "where the act or omission occurred." 28 U.S.C. § 1346(b). There is no dispute that the tortious conduct complained of occurred in Washington state.

The manufacturers apply Washington law up to a point. Eagle-Picher argues that under Washington's choice-of-law principles, the Court must consider its claim against the United States as *vessel owner* pursuant to the federal jurisprudence of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905 (b).[2] Under the circumstances of this case, the argument continues, Washington state courts would have to look to the federal statute to determine the liability of a private person, thus, this court must look to that law in adjudging the conduct of the Government. *See, Lambertson v. United States*, 528 F.2d 441, 444 (2d Cir.), *cert. denied*, 426 U.S. 921, 96 S.Ct. 2627, 49 L.Ed.2d 374 (1976).

Raymark comes to the same conclusion arguing that although a private *employer* is immune from suit by its employees and third-parties claiming noncontractual indemnity or contribution, RCW 51.04.010, *Glass v. Stahl Specialties Co.*, 97 Wash.2d 880, 652 P.2d 948 (1982), Title 51 does not reach activity covered by maritime remedies. RCW 51.12.100. The applicable maritime remedy is the LHWCA which sanctions third-party lawsuits against the United States in its capacity as *vessel owner*. 33 U.S.C. §§ 905(b), 902(21); *Lockheed*, 460 U.S. 190, 103 S.Ct. 1033; *In re All Asbestos Cases*, 603 F.Supp. 599 (D. Hawaii 1984).

Summarized, the manufacturers' argument, characterizing the Government's activities as maritime, applies only Washington's choice-of-law principles, then argues that LHWCA federal jurisprudence allows third-party lawsuits against compensation paying employers who are also vessel owners (a "dual capacity" theory).

The Government argues, first, that the 1981 Tort Reform Act abolished indemnity, *inter alia*, where trial on the underlying claims had not taken place by July 26, 1981. RCW 4.22.040(3) and 920(2). The manufacturers counter that only indemnity between active and passive tortfeasors was abolished, and that nothing in the statute extinguished other circumstances under Washington law where indemnity is allowed: where an express contract so provides or there existed (and was breached) an independent duty between the putative indemnitor and indemnitee.

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[2] "Longshoremen" changed to "Longshore" by Amendments of 1984, Pub.L. No. 98-426, § 27(d).

While the manufacturers appear to imply two basis for allowing indemnity, *Glass v. Stahl*, 97 Wash.2d 880, 652 P.2d 948 (1982), however, speaks of the need for express, written agreements before an employer may be deprived of the immunity provided by Washington's Industrial Insurance Act:

> This court has recognized, however, that a third party claim against the employer can be maintained if the employer "voluntarily assumes an independent duty or obligation to the third party." Generally, Washington courts have required that a written indemnification agreement between the employer and the tortfeasor exist before such an independent duty or obligation could be found. Such agreements purporting to deprive an employer of the immunity provided by the Industrial Insurance Act are disfavored under Washington law, and any intent to provide for indemnification must be clearly expressed in the agreement.

Id. at 885-86, 652 P.2d at 951. (Citations omitted.) Therefore, there being no cause of action for indemnity between active and passive tortfeasors, RCW 4.22.040 (3), nor a written indemnification agreement, nor other clear indication that the parties intended to provide for indemnification, the manufacturers' cause of action for indemnity is dismissed.

Second, the Government argues that although the 1981 Tort Reform Act created a right of contribution in those cases not tried by July 26, 1981, contribution runs only against *joint tortfeasors*, *i.e.*, persons "who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm." RCW 4.22.040(1); *Glass*, 97 Wash.2d at 883, 652 P.2d at 950. The Government argues that it has no tort exposure or liability to the Plaintiff because the FECA guarantees compensation for workplace injuries regardless of fault in return for workers giving up their right to sue. Since employees have no right to sue in tort, the Government has no tort liability and cannot be a joint tortfeasor. Also, continues the Government's argument, viewing the United States as a private employer, as the FTCA requires, a private employer in Washington is covered by the State's Industrial Insurance Act. RCW Title 51. The Act's exclusive remedy provision, RCW 51.04.010, abolished all employee actions against employers for workplace injuries, and the jurisprudence construing that provision precludes "dual capacity" suits and parallel third-party claims for contribution.

Pursuant to the requirements of the FTCA, and there being no doubt that the underlying alleged tortious conduct occurred in Washington, the manufacturers' claims for contribution must be viewed in accordance with Washington law concerning contribution. The question is whether under the circumstances of this case, Raymark and Eagle-Picher have a claim for contribution under Washington law. The 1981 Tort Reform Act provides that in those cases not tried before July 26, 1981, contribution runs against persons "who are jointly and severally liable upon the same indivisible claim, for the same injury, death or harm." RCW 4.22.040(1). The question then becomes whether, pursuant to RCW 4.22.040(1), the Government is jointly and severally liable for Plaintiff Lopez's injury. The FECA, by virtue of its paying employees immediate, fixed benefits, regardless of fault, without the need for litigation, but in return for the employee giving up the right to sue, precludes the Government from being a joint tortfeasor. This conclusion is mandated by the logic of long-standing Ninth Circuit opinion holding that because of the FECA exclusive remedy provision, the United States cannot be a joint tortfeasor for the purposes of third-party recovery where federal employees are involved. In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom. United Air Lines v. United States*, 379 U.S. 951, 85 S.Ct. 452, 13 L.E.2d 549 (1964), the Court concluded, first, as did the Supreme Court later in *Lockheed*, that the FECA did not itself bar recovery by a third party, and, second, that under applicable state law, indemnity was available only against joint tortfeasors; owing to the exclusive liability provision of FECA, the United States had no tort liability to the deceased federal employees or their survivors. "There being no underlying liability on the part of the government, United's claim for indemnity must fail." *Id.* at 404. This conclusion was later reaffirmed in *Wien Alaska Airlines v. United States*, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940, 88 S.Ct. 288, 19 L.Ed.2d 291 (1967). Still later, the Ninth Circuit found no justification for reconsidering *Wiener*. *Adams v. General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976).

Thus, under the analysis provided in the foregoing cases, the manufacturers do not have a claim for contribution under Washington law because the FECA exclusive liability provision precludes the United States from being a joint tortfeasor for purposes of third-party recovery.

b. *The Analogous Private Person*

Even if the foregoing Ninth Circuit opinions could be avoided and the United States considered a joint tortfeasor, the next step would be to view the United States as a private individual under like circumstances, pursuant to 28 U.S.C. § 1346(b), and the same result would obtain. On the issue of whether the circumstances are such that the Government, if a private person, would be liable in accordance with Washington state law, the Government argues that the analogous private individual is a Washington employer covered by the Washington Industrial Insurance Act, while the Defendant manufacturers argue that the analogous private party is a private shipyard/vessel-owner employer in Washington covered by the LHWCA.

To determine whether the circumstances are such that the United States as a private person would be liable to the manufacturers, it is logical to focus on the most significant elements of the circumstances. Significant elements obviously are elements material to the issue of liability. Immunization from tort liability pursuant to an arrangement where the employer pays benefits regardless of fault is as significant as the allegations of breach of duty. The analogous private person, then, is a Washington employer covered by the Industrial Insurance Act, RCW Chapter 51.04-51.98, because that Act contains an exclusive liability provision similar to that of the FECA.

The Government and the manufacturers are in agreement on the effects of the Industrial Insurance Act on a covered employer. A Washington employer covered by the Industrial Insurance Act has the benefit of the Act's exclusive remedy provision, RCW 51.04.010, which abolishes all employees' actions against employers for work place injuries. Washington case law construing the exclusive remedy provision of the Washington Industrial Insurance Act has concluded that this provision, "of the broadest, most encompassing nature," *West v. Zeibell*, 87 Wash.2d 198, 201, 550 P.2d 522, 524 (1976), precludes dual capacity suits, *Thompson v. Lewis County*, 92 Wash.2d 204, 206, 595 P.2d 541, 542-44 (1979), and parallel third-party claims for contribution: "Where there is no liability, there can be no joint and several liability. Where there is no joint and several liability, there is no right of contribution." *Glass*, 97 Wash.2d at 886-87, 652 P.2d at 952. Therefore, under Washington law, a private person in circumstances similar to the Government, would not be liable to third parties claiming contribution, owing to the similar operation of the Washington Industrial Insurance Act to the FECA.

To consider the Government as a private employer covered by the LHWCA would be to ignore the FECA as a significant aspect of the Government's circumstances. While Section 905(a) of the LHWCA provides exclusive liability to the employer, Section 905(b) preserves an action against the vessel, *i.e.*, against the ship owner, notwithstanding that the employer and ship owner may be the same.[3] *See, Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Thus, the Government was seen having a dual capacity of employer and ship owner, being immune in the former, but subject to traditional tort liability in the later capacity until the law was changed. Clearly, an employer subject to the LHWCA before amendment does not abide in circumstances similar to the United States subject to the FTCA and the FECA.

There are other impediments to analyzing the Government's liability in these circumstances under the LHWCA. The LHWCA expressly excepts from coverage employees of the United States or any of its agencies. 33 U.S.C. § 903(a)(2) (now 33 U.S.C. § 903(b) by amendment of September 24, 1984). Plaintiff Lopez would be an excepted employee. The manufacturers' argument requires the application, through Washington's choice-of-law rules, of federal jurisprudence construing the LHWCA. The LHWCA must apply, according to the argument, because the Washington Industrial Insurance Act does not cover those aspects of shipyard activity covered by maritime remedies. RCW 51.12.100. The United States would thus be subject to liabiilty for harm to one of its employees, Plaintiff Albert Lopez, pursuant to a statute from which employees like Lopez were excluded. This result cannot have been within the contemplation of Congress.

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[3] Amendment to Section 905(b) of September 28, 1984 barred suits by private shipyard employees covered by LHWCA against the employer as ship owner. Sections 5(a)(1) and 28(c), Pub.L. 98-426, 98th Cong., 2d Sess.

Another problem centers on the necessary maritime nature of claims properly within the LHWCA's ambit. The First Circuit has reviewed the relevant history of the LHWCA, *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1012-1014 (1st Cir. 1985), and has concluded that "§ 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute." No argument has been advanced to persuade a contrary conclusion. The underlying tort sued upon by Plaintiffs Lopez is a product liability action under Washington law. This District Court concluded in *Franklin v. Johns-Manville*, Civil Cause No. C81-533M (Order Denying Plaintiff's Motion to Amend Complaint, June 10, 1982) that there was no maritime nexus rendering the tort allegations cognizable in admiralty. The First Circuit concluded similarly in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert. dismissed*, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983), as have all other circuits since then, including the Ninth, that have considered the question of the nexus to maritime activity of asbestos injury sustained by shipyard workers. *See, Drake* at 1015, and *e.g., Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983). Because Plaintiffs could not have brought the underlying cause of action in admiralty, it follows, perforce, that the manufacturers could not bring a derivative contribution/indemnity action.

c. *Independent Duties*

In addition to the contribution/indemnity claims, which are essentially derivative of the Plaintiff's cause of action, the manufacturers also contend that the Government owed noncontractual, independent duties of care directly to the manufacturers. These direct duties of care derive from the special, unique relationship between the Government and the manufacturers. This "special relationship" derives from the manufacturers and the Government working together in "a very real, if not legally cognizable, partnership—in the development, design, manufacture, sale and procurement of asbestos-containing insulation products for use at federal and government-contract shipyards throughout the country." (Eagle-Picher memorandum in response at p. 26.) The duties of care arising from this "special relationship" are said to include duties (1) not to require the production of unsafe products, (2) to share with the manufacturers the extensive knowledge the United States alone possessed regarding occupational exposure to asbestos dust, and (3) to use the manufacturers' products in the manner for which they were intended and in a reasonably safe and prudent way. (*Id.* at 27-28.)

A similar argument was made by the manufacturers in *Drake.* The defendants argued that the puntative indemnitor owed a duty, independent of that owed its employees, not to use asbestos materials in a way that would make them unreasonably dangerous to the employees or others. Whether the duty was based on tort or contract or on an express or implied contract was not alleged. In dismissing the claim for failure to state a cause of action upon which relief could be granted, the *Drake* court relied on the language of Judge Friendly in *Zapico v. Bucyrus-Erie Co.,* 579 F.2d 714 (2nd Cir. 1978). Judge Friendly, summarizing, said the Defendant was

> asking us to hold a user liable to a manufacturer for the former's negligent use of the latter's defective product. This we decline to do. Cf. 2A Larson [Workmen's Compensation Law], *supra,* at 402 [(1976)] ("But when a purchaser buys a product, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality").

Id. at 723.

In urging that noncontractual indemnity is available in the case at bar, Eagle-Picher is stretching legal concepts beyond their rational borders. To hold the Government liable to Raymark and Eagle-Picher for the Government's alleged negligent use of these manufacturers' alleged defective products is a convoluted attempt to reshuffle liability. This attempt carries with it no logic or justice.

The "special relationship" underpinning to this argument must fail. This "special relationship" harkens back to the Government contract specifications defense where the manufacturers of asbestos containing products contended, *inter alia,* that the Government had extensive knowledge of asbestor hazards and exercised control over the design process. The validity of this defense was disposed of in the Court's "Order on Cross Motions for Summary Judgment" in *Tefft v. A.C. & S., et al.,* C84-154M, October 11, 1984. In that case, and two others decided at the same time (*Raines,* C84-165M and *Marry Rose,* C84-168M), the manufacturers asserted the Government contract specification defense. The Court concluded:

> . . . that because the manufacturers had significant influence over the development of specifications, and because certain specifications were performance spec-

> ifications which leave the details of manufacture to the manufacturer, the Defendants PCC, Fibreboard, and Raymark have failed to meet their burden on the element concerning who established the specifications. This element being dispositive of the defense, the Court need not address the remaining elements. Accordingly, summary judgment must be granted in favor of the Plaintiffs and denied as to the defendants.

Eagle-Picher did not assert the Government contract specifications defense in these cases, but in this case, it draws conclusions about the United States' domination of the design and manufacturing process in a self-serving way in a few paragraphs.

This argument for indemnity is also related to the earlier analysis under part 2.a. concerning Washington's abolition of indemnity. (Page 153, *supra.*) Neither Raymark nor Eagle-Picher has demonstrated persuasively that the United States as consumer of their products owed them a duty such that the United States should indemnify the manufacturers in the amount of their damage settlements with Plaintiffs. Having reached this conclusion, it is unnecessary to reach the issue of whether under Washington law the manufacturers' right of contribution was waived by the settlements.

B. The Tucker Act (Contract Claims)

In addition to their FTCA based indemnity/contribution claims, Eagle-Picher and Raymark seek contractual indemnity from the United States pursuant to the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1402,[4] which confers jurisdiction on the district courts and Court of Claims for claims, not exceeding $10,000, against the United States, based on express or implied contract.

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[4] Act of March 3, 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.). The Act is named for its principal author and promoter. John Randloph Tucker of the House Committee on the Judiciary. Orme, *Tucker Act Jurisdiction over Bench of Trust Claims*, B.Y.U.L. Rev. 855 (1979).

Eagle-Picher bases its claim on both written contracts for the Government's procurement of asbestos-containing products from Eagle-Picher and implied-in-fact contracts arising from the conduct of Eagle-Picher and the Government in the development, production, and distribution of asbestos-containing products. The breached duties under these contracts arise from the necessary conformance with the Government's mandatory specifications. By contractual enforcement of these mandatory specifications, the Government implied that it warranted them for their safety, among other things. Additionally, Eagle-Picher argues that the Government implicitly warranted that it would exercise due care in designating, specifying, and using Eagle-Picher's asbestos-containing insulation products.

Raymark, like Eagle-Picher similarly contends (1) that the Government made implied warranties that it would use due care in designing, specifying, and overseeing the use of asbestos products at Puget Sound Naval Shipyard, and (2) that the Government implicitly warranted its mandatory specifications for their accuracy, feasibility, and safety.

The Government contends that the manufacturers are not entitled to contractual indemnity under the Tucker Act because the Anti-Deficiency Act, 31 U.S.C. § 1341, prohibits Government employees from committing the United States to a "contract or obligation for the payment of money before an appropriation is made, unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Since express indemnification agreements are prohibited, implied agreements must also be prohibited, and since there has been no Congressional appropriation for the agreements alleged, and since one who deals with an agent of the Government is charged with knowing the limits of the agent's authority, the claims based on an implied contractual duty or agreement to indemnify must be dismissed.

Alternatively, the Government argues that even if the manufacturers' claims were not barred by the Anti-Deficiency Act, Tucker Act claims are limited to express or implied-in-fact contracts, not those implied-in-law.

1. *The Antideficiency Act*

Because the Antideficiency Act is dispositive when applied to the Tucker Act claims herein, its provisions should be considered first. The Antideficiency Act, 31 U.S.C. § 1341, provides in pertinent part as follows:

> (a) (1) An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (a) (1). The obvious purpose of the statute is to prohibit anyone from obligating the Government in excess of the dollars appropriated by Congress. *Solar Turbines International v. United States,* 3 Cl.Ct. 489 (1983).

An Agreement by the Government to indemnify a product seller for future tort liability that the seller may incur as a result of a government employee's use of the product would create a future obligation of unknown magnitude. While the amount of money needed to purchase the product could be readily computed and appropriated, the amount needed to cover such a contingency as future tort liability would be unknown. Without extra money being appropriated to cover the contingency, it would constitute a deficiency which would violate the Antideficiency Act. In *In re All Asbestos Cases*, the Court noted that

> The Comptroller General consistently has taken the position that a government agent may not make any oral or written agreements to indemnify or "hold harmless" a contractor for future losses under a contract, absent specific authorization or appropriation. 35 Comp.Gen. 85 (1955); 33 Conp.Gen. 90 (1935); *see also, California-Pacific Utilities Co. v. United States*, 194 Ct.Cl. 703 (1971).

603 F.Supp. at 611. Exemplifying this conclusion in a thorough analysis is *Matter of Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp.Gen. 361 (1983) (attached as Exhibit G to the Government's opening memorandum herein). There, the Comptroller General affirmed his earlier decision that a clause (desired by the Public Contract Law Section of the American Bar Association for use in cost reimbursement contracts) entitled, "Insurance-Liability to Third Persons," violates the Antideficiency Act. The Comptroller General took the view that the maximum amount of obligation could not be determined at the time a contract was signed and noted that the General Accounting Office (GAO) suggested that "no open-ended indemnities be promised without statutory authority to contract in advance of appropriations." *Id.* This Comptroller General opinion goes on to distinguish the rare situations where indemnification agreements were granted. None of those unique situations applies to this case involving ordinary procurement contracts. The cases demonstrating this unbroken pattern stretch back beyond the time when the Comptroller General's Office existed. In 15 Comp.Dec. 405 (1909), the

Secretary of the Treasury (the Comptroller General's predecessor) said:

> Under the [Antideficiency Act], no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract.

Id. at 6. (See Government's Exhibit G.)

Raymark argues that 3 U.S.C. § 1304(a) contradicts the Government's position concerning the Antideficiency Act. This argument is without merit. ". . . [T]he effect of § 1304(a) is simply that the Anti-Deficiency Act does not bar payment of valid judgments against the United States. Thus, § 1304(a) is irrelevant to the issue of whether, in these cases, the legal predicate for judgment against the government exists." *In re All Asbestos Cases,* 603 F.Supp. at 612, n. 16.

The manufacturers have cited no cases that demontrate with persuasive authority that the Antideficiency Act does not prohibit the Government from implicitly agreeing to indemnify manufacturers with whom it contracts for the manufacturers' liability versus a third party who used the product sold to the Government. In *Terteling v. United States,* 334 F.2d 250, 255, 167 Ct.Cl. 331 (1964), cited by the manufacturers, the United States contracted to furnish gravel pits *without cost* to the contractor. When the contractor had to defend itself in lawsuits brought by landowners of certain lands from which gravel had been taken, the Court read the "without cost" provision to be unrestricted and to not prohibit reimbursement of litigation costs. These facts are unique and not at all applicable to the Government's relationship with these manufacturers. Moreover, the case involved the meaning of a term of the written contract between the parties.

Because the Antideficiency Act is a bar to the manufacturers' claims of an implied contract to indemnify, those claims, brought pursuant to Tucker Act jurisdiction, are dismissed.

2. *Claims Actionable Under the Tucker Act*

Even if the Antideficiency Act were no bar to the manufacturers' contract based claims, further analysis of these asserted implied agreements to indemnify reveals yet another ground for their dismissal.

It is well-settled that Tucker Act jurisdiction extends only to claims arising out of express or implied-in-fact contracts, and that it does not reach contracts implied in law. *In re All Maine Asbestos Litigation*, 581 F.Supp. 963, 972 (D.Maine 1984). *In re All Asbestos Cases*, 603 F.Supp. 599, 610 (D.Hawaii 1984), each citing *Merritt v. United States*, 267 U.S. 338, 340-41, 45 S.Ct. 278, 279, 69 L.Ed. 643 (1925), and *Hatzlack Supply Co. v. United States*, 444 U.S. 460, 100 S.Ct. 647, 62 L.Ed.2d 614 (1980).

> The distinction between a contract implied in fact, over which there is Tucker Act jurisdiction, and a contract implied in law, over which there is no Tucker Act jurisdiction, is well established. An implied-in-fact contract contains all the necessary elements of a binding agreement, but, since its express terms have not been reduced to writing or stated orally, its provisions must be inferred from the intent and course of conduct of the parties. *See* Restatement (Second) of Contracts §§ 4, 19 (1981), 1 A. Corbin, *Corbin on Contracts* § 19 (1963). An implied-in-law contract, a so-called quasi-contract, is not a contract at all, but a legal fiction which enables a court to fashion an equitable remedy to prevent

> the unjust enrichment of one party at the expense of another.

581 F.Supp. at 972.

In *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106, 1109-12 (D.Conn. 1982), the Court analyzed both whether there was an implied obligation as a matter of law or one as a matter of fact, *i.e.*, one arising from the purchaser's affirmative conduct. As to whether an obligation arose as a matter of law, the Court quoted *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216 (9th Cir. 1974) where the plaintiff sued Dow on negligence and strict liability theories for injuries sustained while using an industrial caustic soda. Dow impleaded plaintiff's employer Kennecott Copper Corp. (KCC) alleging its failure to properly instruct its employer and to provide a safe work environment. Finding no express obligation by KCC to Dow, the Court found no other basis to find that KCC owed an independent duty to Dow:

> Dow's liability arises because of a breach of a duty it owes to users of its products—in this instance, a worker. Assumably, Kennecott has also breached a duty owed to the same worker by its negligence. Under Dow's theory, the whole burden of loss would be shifted whenever the employer was negligent in any way because the employer would have failed in its duty to extricate the third party from possible liability. Yet indemnity does not work in that way.

Id. at 1110.

Concluding that no implied obligation arose as a matter of law, the Court turned to the question of whether one could be fairly and reasonably inferred from affirmative conduct of the purchaser, other than the mere purchase of the product. The Court concluded that the purchase orders' references to Government-promulgated specifications—an argument similar to that made at bar—were not sufficient to imply a contractual obligation to indemnify the third-party plaintiffs. The Court said it could not logically be contended

> that the requirements of the military specifications referred to in Electric Boat's purchase orders created in any way a risk to the plaintiffs which was not inherent in the ordinary and voluntary marketing of asbestos products.
>
> * * * *
>
> To accept arguments of the third-party plaintiffs, for which no authority of relevance is cited, would truly turn "indemnity on its head," *Santisteven v. Dow Chemical Co.*, 506 F.2d [1216] at 1219 [9th Cir. 1974], since the representation that a product is safe for its intended use normally flows from the manufacturer to the purchaser, not vice versa.

Id. at 1112.

In support of their position that, in effect, the specifications themselves create a basis for liability, the manufacturers cite *Ordnance Research, Inc. v. United States*, 609 F.2d 462, 221 Ct.Cl. 641 (1979) and *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918). The Government correctly argues that these cases are distinguishable in that damages or equitable contractual adjustments were awarded because government specifications or delays or other mistakes increased the cost of actual performance, and in such cases there is assumed to be governmental intention and commitment to pay for performance to complete the contract. These cases did not involve indemnification for tort judgments or settlements incurred by the contractors. Such liability is manifestly collateral to contractual performance. In *In re All Maine Asbestos Litigation*, 581 F.Supp. 963 (D.Maine 1984), the court concluded that "without any evidence of consent, this Court cannot find a contract implied in fact," *id.* at 973, and that the sale of the asbestos products to the Government pursuant to specifications provided no basis for finding an implied warranty such that indemnification by the Government was necessary:

> It is well established that a vendor/vendee relationship creates no implied agreement by the buyer to indemnify the seller for injuries resulting from the use of the purchased product. *In re General Dynamics Asbestos Products*, 539 F.Supp. 1106, 1110-12 (D. Conn. 1982); *Zapico v. Bucyrus-Erie Co.*, 579 F. 2d 714, 723 (2d Cir. 1978); *White v. Johns-Manville Corp.*, 662 F.2d 243, 248 (4th Cir. 1981).

Id. at 981.

Other courts have drawn similar conclusions concerning the asserted, implied "reverse warranty." In *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981), the Court said:

> This "reverse warranty" theory distorts the concepts of implied warranty "out of all relation to reality." 2A A. Larson, the Law of Workmen's Compensation § 76.44 at 14-402. There is no express warranty here, and no such warranty arises under the Virginia sales statute, *see* Va.Code §§ 8.2-314, 315, or simply from a vendor/vendee relationship. *Jennings v. Franz Torwegge Machine Works*, 347 F.Supp. 1288, 1289 (W.D.Va. 1972), *see Santisteven v. Dow Chemical Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974) (manufacturer's argument that purchaser has independent duty to avoid subjecting manufacturer to the risk of tort liability "turns indemnity on its head.").

Id. at 248. *Accord, Colombo v. Johns-Manville Corp.*, 601 F.Supp. 1119, 1139-40 (E.D.Pa. 1984). Also, the quoted statement of Judge Friendly in *Zapico* applies with equal vigor here. (See p. 156, *supra.*)

Consequently, whether analyzed as barred by the Antideficiency Act or as not being a claim actionable under the Tucker Act, the manufacturers' contractually based claims are dismissed for failure to state claims for which relief can be granted.

CONCLUSION

Based on the foregoing discussion, all third-party claims are dismissed for failure to state claims on which relief can be granted. This result is not only consistent with precedent and traditional application of contract principles, but policy considerations underlying the relevant statutory provisions are also well served.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1543 and 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,
Plaintiffs,
and

RAYMARK INDUSTRIES, INC. and
EAGLE-PICHER INDUSTRIES, INC.,
Defendants/Third-Party-Plaintiffs/Appellants,

v.

A.C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING, INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK, INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWEN-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,
Defendants,

v.

UNITED STATES OF AMERICA,
Third-Party-Defendant/Appellee.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Washington
in Case No(s). C84-155M

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Sep. 28, 1988

Issued as a Mandate: November 29, 1988

Costs: Against; Appellants

Printing	$1,172.32
Total	$1,172.32

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1543, -1544

Albert Lopez and Shirley Lopez,
Plaintiffs,
and

Raymark Industries, Inc. and
Eagle-Picher Industries, Inc.,
Defendants/Third-Party-
Plaintiff/Appellants,

v.

A.C. & S., Inc.; American Asbestos Textile Corp., a/k/a Amatex Corp.; Armstrong Cork, Inc.; Asarco, Inc.; Carey Canada, Inc.; The Celotex Corp., successor in interest to Philip Carey Manufacturing Co., Philip Carey Corp., Briggs Manufacturing Co., and Panacon Corp.; Combustion Engineering, Inc.; Crown Cork & Seal Co.; Fibreboard Corp.; The Flintkote Co.; Forty-Eighty Insulation, Inc.; GAF Corp., successor by merger with Ruberoid Co.; Garlock, Inc., Johns-Manville Sales Corp.; J.P. Stevens, Inc.; Keene Corp., successor by merger with Baldwin-Ehert-Hill a/k/a Asten Hill; Nicolet Industries; Owen-Corning Fiberglas Corp.; Owens-Illinois Corp.; Owens Illinois Glass; Pittsburgh Corning Corp.; Raybestos-Manhattan; Southern Textile; Standard Asbestos; Union Asbestos; Rubber Co., a/k/a Unarco Industries, Inc.,
Defendants,

v.

United States of America,
Third-Party-Defendant/
Appellee.

Before MARKEY, *Chief Judge,* RICH and ARCHER, *Circuit Judges,* NICHOLS and BENNETT, *Senior Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

November 21, 1988

cc: Philip A. Talmadge
Joe G. Hollingsworth
David S. Fishback
Paul A. Zevink

APPENDIX E

STATUTES INVOLVED

28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * *

28 U.S.C. § 1402

§ 1402. United States as defendant

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346,

in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

(c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action.

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.

June 25, 1948, c. 646, 62 Stat. 937; Sept. 2, 1958, Pub.L. 85-920, 72 Stat. 1770; Nov. 2, 1966, Pub.L. 89-719 Title II, § 202(b), 80 Stat. 1149; Oct. 25, 1972, Pub.L. 92-562, § 2, 86 Stat. 1176.

28 U.S.C. § 1346

§ 1346. United States as defendant

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

* * * *

33 U.S.C. § 905(b) (1982)

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

5 U.S.C. §§ 8116

§ 8116. Limitations on right to receive compensation

* * * *

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 542; Pub.L. 90-83, § 1(56), Sept. 11, 1967, 81 Stat. 210; Pub.L. 93-416, § 9(a), Sept. 7, 1974, 88 Stat. 1145.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C84-154M

HUGH TEFFT and AKIKO TEFFT, husband and wife,
Plaintiffs,
v.
A. C. & S., INC., *et al.,*
Defendants.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

[Filed Oct. 12, 1984]

INTRODUCTION

The Plaintiffs and the Defendants have each moved for summary judgment on the "government contract defense." The Plaintiffs have moved for summary judgment on each of the four elements of the defense against Defendants Pittsburgh Corning Corporation (PCC) and Fibreboard Corporation (Fibreboard) in the cases of Hugh Tefft, C84-154M; William Raines, C84-165M; and Albert Marry, C84-168M (brought by Dorothy Marry Rose for the benefit of Mr. Marry's estate); Plaintiffs' memorandum for summary judgment against Raymark in these cases presents argument on all but the third element.

PCC and Fibreboard seek summary judgment on each of the four elements of the defense. Raymark seeks summary judgment on the first three elements.

The Government opposes Defendants' motions for summary judgment and supports Plaintiffs' motion for summary judgment.

Plaintiffs Tefft and Raines have asbestosis but continue to work at Puget Sound Naval Shipyard (PSNS). Mr. Tefft worked from 1954-1955 and from 1969 to the present as an insulator. Mr. Raines worked from 1960 to the present primarily as an electrician. Mr. Tefft has received a lump sum Federal Employees Compensation Act (FECA) payment, and Mr. Raines will become eligible for FECA payments as his illness progresses.

Plaintiff Marry worked as an insulator at PSNS during the years 1929-1930, 1933-1947, and 1948-1965. He died in 1968 as a consequence of asbestos exposure.

BACKGROUND AND SUMMARY CONCLUSION

Summary Judgment is GRANTED in favor of the Plaintiffs and DENIED as to Defendant manufacturers. The Defendant manufacturers have failed to carry their burden on the second element, which is of paramount importance in establishing control over the injury-causing element of the products.

The parties have addressed the following elements of the defense earlier set out by the Court:

1. The product was supplied to the Government pursuant to a contract;

2. The Government established the specifications for the product;

3. The product met the Government's specifications in all material respects; and

> 4. The Defendant did not have, and failed to disclose, information unknown to the Government about the hazards associated with the use of the product that might reasonably have affected the Government's decision to specify its use.

Additionally, the Court indicated that if the specifications were "performance" specifications as distinguished from "design" specifications, the defense would fail.

Determination of a specification's nature is crucial, because if a specification is the "performance" type, no analysis of the other elements is necessary. The parties generally agree upon what "design" and "performance" specifications are. The Armed Services Board of Contract Appeals set forth the definitions in one of its cases ("the purchase description" (brand name) specification discussion is omitted):

> There are design specifications in which are stated precise measurements, tolerances, materials, in-process and finished product tests, quality control and inspection requirements, and other information. With regard to design specifications the Government accepts general responsibility for design and related omissions, errors and deficiencies in the specifications and drawings. . . .
>
> There are also performance specifications, in which are stated the performance characteristics desired for the item, e.g., a vehicle to attain a speed of 50 miles per hour. In such specifications, design, measurement, etc. are not stated or considered to be of importance so long as the performance requirement is met. Consequently, where an item is purchased by a performance specification, the contractor accepts general responsibility for design, engineering and achievement of stated performance requirements. He has general discretion and election as to detail but the work or product is subject to the Govern-

> ment's reserved right of final inspection, and approval or rejection of the work or or product.

Areodex, ASBCA No. 7121, 1962 BCA ¶ 3492. The Court went on to say:

> A great deal of the difficulty lies in the fact that many statements of contract requirements are necessarily a mixture of two or all three types of specifications described above. . . . When such a mixture occurs, it is necessary to test each portion of the specification, insofar as responsibility is concerned, in accordance with the rules stated above.

Id.

There were government specifications pursuant to which defendant manufacturers could sell to the Navy the asbestos-containing products at issue here. The relevant parts of these specifications, whether the product was block insulation, pipe covering, or cloth, were the parts concerning material or composition.

No one points to any prohibition in the specifications relative to placing warnings on the products' packages, but the significance of this is a matter more appropriately discussed under the relative knowledge element. The need for a warning concerning dangers associated with using products containing asbestos, and indeed whether a product ought to contain asbestos at all as a matter of safety, are questions about the state of knowledge concerning asbestos hazards. This knowledge has, or should have, an impact upon what the specifications require.

Presently, however, our focus is upon the nature of the specifications. If they are performance specifications, with responsibility for achieving stated performance requirements left to the manufacturer, then relative knowledge need not be assessed.

In its first order granting Defendants' motion to assert the government contract specifications defense, the Court discussed the theory underlying it. The defense is essentially agency theory in a tort context. Its purpose is to establish who had control over the details of the work or product that produced the harm. The agency aspect of this defense figures into the issue of whether or not a product was supplied pursuant to a contract with the United States. The contract serves to establish the appropriate relationship between the Government and a manufacturer. A diminished relationship exists where a third-party distributor is involved in selling a manufacturer's qualified products to the Government. Hence, in the circumstances of these cases, the contract element is an awkward device for establishing who had control over the specifications' content. Under the second element, control over the aspect of a product that produced the harm is established by a consideration of the specifications themselves and their development.

The Defendants have failed to carry their burden on the second element. The Defendants have failed to demonstrate that the Government had such control over the injury-causing aspect of the specification that potential liability lies with it rather than the Defendant manufacturers. This is so because some specifications were the performance type and because there was industry collaboration in the development of the specifications. Whether design or performance specifications are concerned, the thermal insulation industry—individual manufacturers and trade associations—gave significant assistance to the Government. Indeed, the unrebutted testimony of individuals having long-term familiarity with the procedures for writing specifications for thermal insulation attests to a regular course of communication between Government and industry. The communication occurred when the Government sought to fill its needs wherever possible with products that were already commercially available, and when it sought to prepare specifications such that more than one manufacturer could sell to the Government under a single specification. The procedure was formally mandated in the early 1950's in the Defense Cataloging and Standardization Act, 10 U.S.C. §§ 2451-56 (1976), where the Secretary of Defense was charged with

> maintain[ing] liaison with industry advisory groups to coordinate the development of the supply catalog and the standardization program with the best practices of industry and to obtain the fullest practicable cooperation and participation of industry in developing the supply catalog and the standardization program;

Id. § 2452(4).

DISCUSSION

Pittsburgh Corning Corporation

It is undisputed that PCC manufactured pipe covering called Unibestos, from July 1962 to February 1972, and that it complied with specification number MIL-I-2781. (*See* specification amendments and qualified products list at U.S.' Exhibits 15 and 16; PCC's Exhibits 11 and 12.) Unibestos was purchased only under Grade II, Class c and Grade III, ~~Class~~ f ~~of~~ MIL-I-2781 until March 1, 1971 when the United States eliminated these provisions. This is also undisputed. The sections of the specification dealing with materials and composition do not specifically require asbestos:

> 3.2 Materials. The pipe covering shall be composed of heat-resisting compounds suitable for temperature conditions and the purpose intended.
>
> 3.3 Composition. The composition of the pipe covering shall conform to that of the sample given qualification approval.

(U.S.' Exhibit 16, PCC's Exhibit 11.) As the United States points out, the remainder of the nine-page specification deals with the shape and dimension of the pipe covering, the performance criteria to be met for each class and grade, and the testing procedures to be used to measure performance.

The Court agrees that MIL-I-2781 is a performance specification. It set out expected performance characteristics by grade (upper temperature limit), by class (composition of calcium silicate compound or of fiber), and, sometimes, by type (light or heavy density). (*E.g.*, U.S.' Exhibit 16 at 5, Table III; PCC's Exhibit 11, Superseding Specification of 13 June 63, Table III.) The materials paragraph leaves the manufacturer with broad discretion to formulate a product to meet certain temperature conditions and purposes. That asbestos may have been the only material readily available for use in meeting certain performance characteristics does not alter the materials paragraphs being a performance specification. The Court in *Southland Mower v. Consumer Product Safety Comm.*, 619 F.2d 499 (5th Cir. 1980) recognized that while "manufacturers remain free to develop new forms of technology that will meet the . . . criterion," in the meanwhile, "a performance requirement may be quite design restrictive in its practical import." *Id.* at 515. By phrasing a specification broadly, the United States fosters competition among manufacturers and allows leeway for differently formulated products to qualify without having to rewrite or create new specifications. (John Haas declaration, U.S.' Exhibit 6.)

John Haas was employed by the Navy in various engineering positions from 1938 to 1946, and 1952 to 1981. *Id.* From 1966 to his retirement in 1981, he oversaw the preparation of specifications originated by the Bureau of Ships, many of which were those concerning thermal insulation. *Id.* At paragraph 12 of his declaration, Mr. Haas states:

> One of the fundamental distinctions in the preparation of military specifications is between those specifications which call for a specific material content ("design" or "content" specifications) and those calling only for performance characteristics ("performance" specifications).
>
> During my employment at NAVSEA and its predecessors, it was generally the policy and practice to write performance rather than design specifications whenever possible. NAVSEA and predecessors preferred performance specifications because they encouraged innovation by manufacturers. Thus, the Navy, through its specifications, encouraged manufacturers to develop new products and to improve existing ones in order to meet the Navy's needs. As a result, the Navy stimulated both cost competition and product development on the part of industry.

Thus, the unrebutted testimony of Mr. Haas articulates the rationale underlying the policy of writing performance specifications wherever possible.

Determining whether a specification is a design of performance type is an effort to determine where the control over the details of a product's creation lies. Therefore, an analysis of a specification should not stop with a determination of what it appears to be on its face.

John Haas sets out the Navy's procedures for writing specifications in paragraph 7 through 11 of his declaration. (U.S.' Exhibit 6.) He describes a situation for example where the Navy might require an insulation product to withstand a certain temperature range. The project engineer would survey the marketplace to find existing products that might work. He would then technically describe the relevant products, usually in terms of their performance characteristics. Comment would then be solicited from the manufacturers, those who would use the products, and other government departments and agencies who might use the products. Mr. Haas points out that

> [M]anufacturers themselves commonly initiate the specification issuance or revision process by offering to sell the Navy products which are not covered by any existing specification. If the offered product is indeed superior to those being purchased, the Navy responds to such industry initiatives by issuing or revising a specification to permit procurement. In such instances too the project engineer contacts with manufacturers, suppliers, and users of the product and drafts a specification based on the technical information he is able to obtain. (*Id.* at 3.)

Mr. Haas also indicates that although project engineers tried to keep current concerning products whose specifications they draft, industry representatives and engineers were the best source of information. (*Id.* at 4.)

The Government, the Plaintiffs, and the Defendant manufacturers have demonstrated that there was a great deal of communication over the years between these manufacturers, their trade organizations, and the Government. The Government was looking for products to fill its needs, and the manufacturers were trying to get their products recognized and qualified for purchase. (*See, e.g.*, U.S.' Exhibits 11 and 12 and PCC's Exhibits 13-17.) John Alfers, a 39-year employee of the Navy in military specifications, states in his declaration (U.S.' Exhibit 9):

> Although my staff engineers attempted to keep current in the areas assigned to them, the industry engineers and representatives inevitably had much greater knowledge concerning the design, composition, manufacturing process, performance characteristics, existing commercial uses, and possible new uses of their own products. My staff necessarily relied heavily upon industry to provide them with

> all the information needed to draft useful specifications. In many cases, the great technical knowledge of the industry representatives gave them substantial influence over the final language and requirements of the specifications.

Joseph Chilcote, a project engineer with the Bureau of Ships, Department of the Navy from 1942 to 1964 when he retired, corroborates and elaborates upon the above statements of Mr. Alfers and Mr. Haas:

> Because time, resource and cost constraints made it impracticable for the Navy to develop the detailed expertise necessary to independently undertake its own product development, when my office was required by other Navy activities to procure a product or material, we invariably consulted with industry to determine product availability from preexisting commercial sources. We regularly met with technical or sales representatives from various companies, including those from insulation manufacturers such as Raybestos-Manhattan, Inc., Johns-Manville and Keasby-Mattison Corporation, who often initiated such contacts. . . . I relied on the specific and comprehensive knowledge so provided regarding their particular product lines because my responsibilities for broad ranging and diverse materials precluded me from acquiring such information quickly in any other manner. Moreover, we wanted to adapt our needs and our specifications wherever possible to products and materials already commercially available in order to facilitate acquisition and to save time and money otherwise required for development. This was invariably true with respect to thermal insulation materials where consultation with industry experts was regularly accomplished with a view towards fully utilizing available industry expertise and materials in fulfilling the needs of the Navy.

(Joseph Chilcote declaration, U.S.' Exhibit 7, at 1-2.)

It is undisputed that another company, Union Asbestos and Rubber Company, known as UNARCO, developed Unibestos, which was later sold by PCC. In its reply brief filed September 21, 1984, PCC commends Joseph C. Olsen's affidavit and exhibits 21-24 to the original Allison affidavit to show that relevant government specifications preexisted Unibestos, which was a unique product developed to fulfill the Navy's requirements. Plaintiffs also submitted Naval and UNARCO documents in exhibits A-35 - A-40 (attached to Richard Hilfer's affidavit filed July 12, 1984). These documents demonstrate that UNARCO developed a product that it wanted to sell to the Navy and that it was willing to bear certain costs associated with testing the product to see whether it had characteristics desirable to the Navy. These documents also substantiate the statements made by Messrs. Haas, Alfers, and Chilcote and demonstrate the procedure for getting a product on the Government's Qualified Products List.

PCC's argument that MIL-I-2781 is not a performance specification but a "government specification with a qualified products list" is without merit. PCC cites portions of the deposition of Al Lede. (PCC's Exhibit 4 to John Allison's Reply Affidavit filed September 21, 1984.) Mr. Lede does testify to there being a specification with a qualified product list (QPL) if that specification required QPL testing. (Lede deposition of August 31, 1984 at 53.) John Haas describes a qualified products list as "a list of products that comply with the requirements of a specification if there are QPL procedures written into that document." (PCC's Exhibit 18 to John Allison's Affidavit filed August 6, 1984: April 4, 1984 deposition at 81-92.) He further explains that

> "the basic concept is that you want to test out various features of the end product totally and in full on a sample or samples of that product, so that later on, when a procurement takes place, you do not have to do all of those tests again. . . . [The manufac-

> turer] would go to a qualified laboratory and have the items checked out to show that they comply with the requirements of the spec.
>
> Then he would certify, when he was offering a product later on, during an actual procurement, he would certify that this product which he is offering is exactly the same as the product which was qualified and was made in the same plant, et cetera, et cetera.

Id. at 85. Because the Qualified Products List was a means to simplify procurement procedures and one which gave some assurance that a product would conform to a specification, the QPL is not dispositive of the nature of the specification to which it applied nor of who had control over what a specification contained.

PCC also argues that Unibestos was a unique product and that no asbestos-free insulation material was available in the United States between 1911 and 1972 that would have satisfied the requirements of MIL-I-2781, Class c or Class f. It is undisputed that Unibestos was only purchased under MIL-I-2781 Grade II, Class c and Grade III, Class f. PCC submits the affidavits of Robert N. Anderson and Joseph C. Olsen which demonstrate that no other product qualified for purchase under those classifications, and that no other material except asbestos could satisfy the requirements of those specifications.

This argument is unpersuasive, however, on the issue of specification type and control over specification content. Although no other product may have qualified under these specifications except one containing asbestos, there was opportunity for another product to qualify using another material. If another product, competitively priced and just as effective, became available, it would be to the Government's advantage to be able to purchase it under an existing specification. If no product became available, this fact cannot be used to create a requirement for a specific material where none existed and where the purpose of phrasing a specification in general terms was to allow for the development of new products. See discussion *supra* at 8, 9.

Fibreboard Corporation

It is undisputed that Fibreboard manufactured and sold various asbestos-containing insulation products at various times between 1928 and 1971. Plaintiffs have waived claims for damages caused by exposure to Fibreboard's insulating cement and will assert damages only for claims for damages caused by Fibreboard's pipecovering and block.

It is undisputed that earlier specifications for pipecovering and block had asbestos requirements. It is also undisputed that these requirements were withdrawn from Navy specifications in 1942 for pipe covering (32P8) and in 1943 for block (32I3). In the 1950's, specifications applicable to the Army, Navy, and Air Force were promulgated. The superseding specifications for thermal insulation in pipecovering form and block form were MIL-I-2781 and MIL-I-2819 respectively. Neither of these specifications had an asbestos requirement.

Fibreboard states that it made 85% magnesia block and pipecovering from 1928-1966, and this is not disputed. Fibreboard's a 85% magnesia block and pipe covering complied with specification HH-I-554, as well as MIL-I-2819 which superseded 32IP and 32P8. An earlier specification, HH-M-61 required asbestos, but this was later deleted in HH-I-554. Paragraph 6.5 of HH-I-554, entitled, "Transportation description" gives minimum shipping weights for asbestos or magnesia insulating material and cannot be used to insert a requirement in paragraph 3.1 and 3.2 establishing general material requirements where no such specific requirement exists.

It is undisputed that Fibreboard manufactured Prasco block and pipecovering from 1928 to 1957. Fibreboard cites an October 12, 1942 letter from the Navy in which the Navy advised that two specifications had been combined into new specification 32P8 and that brands approved under the superseded specifications were retained on the acceptable list for the new specification since no technical changes in the material had been made. (Fibreboard's Exhibit 4 to its August 24, 1984 memorandum.) The new specification did not specifically require asbestos but specified "heat resisting compounds suitable for the temperature conditions and the purpose intended." Fibreboard argues from this that the requirement for asbestos was thus retained in the new specification.

This argument is not persuasive, however, in view of the rationale underlying the United States' efforts to write performance specifications. See discussion, *supra*, 8-9. A product containing asbestos may be qualified under the new specification, but one that did not contain asbestos may also qualify where it would not have under the old specification.

Fibreboard states that it manufactured Caltemp block and pipecovering (called Caltherm during 1951 to 1953) under the trade name Pabco from 1951 to 1968. It submitted Caltemp block and pipecovering to the Navy for qualification testing in 1949. (Fibreboard Exhibit 27 to August 24, 1984 memorandum.) The Navy approved Caltherm block under Specification 32-I-3. (Fibreboard Exhibit 28 to August 24, 1984 memorandum.) Fibreboard states that the Navy approved Caltherm block under MIL-I-2819 in a May 21, 1953 letter.

As discussed earlier, the Government made a practice of going to the industry for information to help it develop relevant specifications. The Government's and Plaintiffs' argument and exhibits concerning specification development amply demonstrate that not only did individual manufacturers offer comments concerning specifications relevant to them, but so did trade associations such as the Asbestos Textile Institute (of which Raymark, earlier known as Raybestos-Manhattan, was a member), the National Insulation Manufacturers Association (NIMA) (of which Pittsburgh Corning and Fibreboard were members), and Magnesia Insulation Manufacturers Association (MIMA). (*See* U.S.' Exhibits 7, 11, 12, 13, 14, and 15; Plaintiffs' Exhibits A-87, A-88, A-89, A-90, and A-92 to August 22, 1984 memorandum re summary judgment against Fibreboard, and citations to the ATI minutes in Plaintiff's August 24, 1984 memorandum re summary judgment against Raymark, pp. 9-12.) For example, the unrebutted deposition testimony of Harry P. Hoopes, at one time a technical representative for Fibreboard to the National Insulators Manufacturing Association, supports the statements of Alfers, Chilcote, and Haas concerning the Government specifications writers' expertise relative to technical characterstics of thermal insulation products. Mr. Hoopes testified that a writer with whom he met on one occasion concerning Caltemp calcium silicate pipe covering and block was "not an expert on insulation products per se," (Hoopes deposition of February 26, 1980 at 107; U.S.' Exhibit 14) although he knew how to write specifications. Mr. Hoopes testified that the specification writer had indicated that Mr. Hoopes was of assistance in informing him of the characteristics of insulation materials, and that a specification was written which would allow Fibreboard to sell Caltemp to the Government. *Id.* at 107-108.

Because control over the aspect of a product that caused an injury is the gravamen of the government contract specifications defense, such collaboration over specifications under the circumstances described by the Government, and supported by the declarations of Messrs. Albers and Chilcote, and evidenced by documents cited above, demonstrates the Government's decided lack of expertise and control. On the contrary, there appears to have been a great deal of dependence by the Government on manufacturers. Under these circumstances, where manufacturers influenced the specifications' content, it cannot be said in fairness that the Government had such control that it should be deemed liable and the manufacturers escape liability. One other court has stated succinctly the impact of such influence: in *O'Keefe v. Boeing Company*, 335 F. Supp. 1104 (S.D.N.Y. 1971), the Court found that

> . . . ultimate responsibility for the design and use of the B-52 bomber rests and always has rested with the United States government. The court concludes, however, that this fact, in itself, neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place. . . .

Id. at 1124.

Raymark Industries, Inc.

Specifications 32C11 and SS-C-466 covered the asbestos-containing cloth manufactured by Raymark. (*See* Exhibits attached to Raymark's memorandum filed August 27, 1984.) The specifications specifically require asbestos. *Id.*

Raymark was a member of the Asbestos Textile Institute referred to earlier at page 17. As demonstrated by the exhibits cited at page 17, this trade association addressed itself to the content of government specifications.

Raymark argues that no amount of such input alters the fact that these specifications were established by the Government or that the Government had the last word on the form and content of the specifications.

The reasoning of *O'Keefe* answers this argument. Where the Government required, sought out, or accepted manufacturers' and/or trade associations' assistance in order that it could draft a meaningful specification, the Government's control over a product's design or composition is lacking even where the specification specifically identifies asbestos as a constituent of the product.

CONCLUSION

The Court concludes, therefore, that because the manufacturers had significant influence over the development of specifications, and because certain specifications were performance specifications which leave the details of manufacture to the manufacturer, the Defendants PCC, Fibreboard, and Raymark have failed to meet their burden on the element concerning who established the specifications. This element being dispositive of the defense, the Court need not address the remaining elements. Accordingly, summary judgment must be granted in favor of the Plaintiffs and denied as to the defendants.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 11th day of October, 1984.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief United States
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HON. WALTER T. MCGOVERN,
CHIEF UNITED STATES DISTRICT JUDGE

Date: July 11, 1984

Deputy Clerk: John McLellan

Law Clerk: Barbara Miener

COURT MINUTE ORDER

Civil: x Jury:

Criminal: Non-Jury:

Case No. 84-154M

Title of Case: Tefft v. Johns-Manville, et al.

THE FOLLOWING MINUTE ORDER IS HEREBY ENTERED: Plaintiff's motion to enforce settlement with Eagle-Picher or in the alternative to dismiss: Court GRANTS voluntary dismissal against Plaintiff Eagle-Picher only. Dismissal without prejudice each party to bear its own costs. Should plaintiff refile its action against this party, the Court will then consider assessing costs pursuant to Rule 41(d).

APPENDIX H

32P5
1933

NAVY DEPARTMENT SPECIFICATION

ROCK WOOL: PIPE COVERING BLANKET, CEMENT, AND FIBER

Technical requirements conform in detail to Federal Specifications HH-P-386 officially promulgated by the Federal Specifications Board ————. Copies of the Federal specification are therefore unnecessary and are not available for distribution by the Navy Department.

A. APPLICABLE SPECIFICATIONS

The following Navy Department specifications, of the issue in effect on date of invitation for bids, form a part of this specification, and bidders and contractors should provide themselves with the necessary copies:

General Specifications for Inspection of Material.

32M2—Magnesia: Block, and Molded Pipe-Covering.

B. TYPES

Rock wool pipe covering shall be furnished in the following types, as required:

Type A—Combination pipe covering.

Type B—Blanket.

Type C—Cement.

Type D—Fiber.

C. MATERIAL AND WORKMANSHIP, ETC.

Rock wool shall be composed of fibers made from argillaceous limestone by a process of melting, blowing, and annealing.

D. GENERAL REQUIREMENTS

D-1. *Sulphur fibers.*—Shall contain not more than 0.50 percent of sulphur.

D-2. *Shot.*—Fibers shall contain not more than 20 percent, by weight, of shot (glass, nonfibrous materials).

D-3. *Stability.*—A sample 4 by 4 inches in size of type A, and the inner layer of type B, shall show no fusion, shrinkage, nor other change which would affect serviceability when subjected to a temperature of 1,000° F. for 6 hours.

D-4. *Density.*—Type A and the inner layer of type B pipe covering, as furnished, shall weigh not more than 12 pounds per cubic foot, including weight of screen wire.

E. DETAIL REQUIREMENTS

E-1. *Type A, combination pipe covering.*

E-1a. *Inner layer.*—The inner layer of type A shall be composed of flat sections of felted rock wool 3 feet long, supported on one side by wire screen and on the other side by strips of wire screen. The supporting wire screen shall be doubled under along both edges for at least 1 inch and around a straight wire not less than 0.08 inch in diameter. The supporting strips of wire screen shall be 1½ inches in width and spaced 1½ to 2 inches apart. When applied to the pipe the two edges shall be clamped together by means of "hog rings" or by lacing with flexible wire.

E-1b. *Outer layer.*—The outer layer shall conform to the requirements of Navy Department Specification 32M2, referred to in section A.

E-1c. *Dimensions.*—The width of the side of the inner layer having the supporting screen wire shall be not more than the outside diameter of pipe plus twice the specified thickness of the layer multiplied by 3.1416.

E-1d. *Tolerance.*—A tolerance of minus 5 percent will be permitted in the width measurements taken on the side of the covering containing the supporting wire screen.

E-1e. *Thickness.*—The thickness of the finished covering, which shall be the thickness after installation, shall be in accordance with the following table:

Table I

Nominal size of pipe (inches)	Rock wool inner layer	Magnesia outer layer	Total
	Inches	*Inches*	*Inches*
2	1 1/4	2	3 1/4
2 1/2 to 4	1 1/10	2	3 1/10
4 1/2	1 1/10	2 1/2	3 1/10
5 to 9	1 1/2	2 1/2	4
10 and above	1 9/10	2 1/2	4 1/10

E-1f. *Jacket.*—The finished sectional covering for the outer layer of type A shall have an attached cotton sheeting jacket weighing not more than 4 ounces per square yard, except when cotton duck weighing 10 ounces per square yard is specified in the purchase order.

E-1g. *Bands.*—Shall be furnished with the outer layer of each delivery of type A at the rate of five bands for two sections. Black japanned steel bands shall be furnished, unless otherwise specified. All bands shall be at least ¾ inch in width with covering for pipe sizes up to and including 5 inches, and at least 1 inch in width for pipe sizes larger than 5 inches. The thickness of the bands shall be not less than 0.007 inch, unless otherwise specified.

E-2. *Type B, Blanket.*—Shall be furnished in rectangular sections, 12 inches or 24 inches wide, 24 inches or 36 inches long, and 1 to 4 inches in thickness, as required. Both sides shall be reinforced with 1-inch-mesh galvanized wire netting with wire 0.049 inch in diameter. The two layers of wire netting shall be sewed or otherwise fastened to each other, through the rock wool, with wire spaced on not more than 6-inch centers.

E-3. *Type C, Cement.*—Shall be composed of a mixture of rock-wool fiber, asbestos fiber, and plastic material which will cause cold setting when tempered with water. At least 85 percent, by weight, shall be a mixture of rock wool and asbestos fiber.

E-4. *Type D, Fiber.*—Shall be composed of rock-wool fibers which have been granulated or rolled up into nodules of about ¼ inch diameter.

F. METHODS OF SAMPLING, INSPECTION, AND TESTS

F-1. *Sampling.*—

F-1a. *Types A and B.*—Representative sections of type A and type B coverings shall be selected at random by the inspector for tests.

F-1b. *Types C and D.*—One container from each 100 or less shall be selected at random by the Inspector and the contents quartered down to a 3-pound sample, for tests.

F-2. *Inspections.*—

F-2a. *Thickness.*—Six samples, inner layers, of type A coverings, or six samples of type B blankets shall be laid up in one pile. The aggregate thickness shall be measured between flat, rigid plates, subjecting the specimens to a pressure of 3 pounds per square foot. The aggregate thickness thus obtained, divided by the number of samples, determines the average thickness of the material.

F-2b. *Density.*—The weight per cubic foot shall be computed, using the thickness obtained under paragraph F-2a, the width, length, and average weight of a section.

F-3. *Tests.*—

F-3a. *Preparation of sample for chemical analyses.*—A 5-pound sample shall be crushed to pass a no. 8 sieve, mixed thoroughly, and reduced by quartering to about 0.5 pound; this crushed to pass a no. 20 sieve, mixed, and quartered to about 50 gram; and this last quarter ground in an agate mortar so that it will pass a no. 100 sleve, mixed thoroughly, and placed in an airtight container until analyzed.

F-3b. *Sulphur.*—Weigh 1 gram of properly prepared sample. Add approximately 0.5 gram of sodium carbonate. Mix thoroughly in a porcelain crucible and heat gently until sintered. Then ignite for 15 minutes at a temperature of approximately 1,000° C., taking care to allow access of air to the contents of the crucible. Cool and place the crucible in a 250-cc beaker and cover with hot water. Add 10 cc of bromine water, then 30 cc of hydrochloric acid (1:1) and boil until solution is complete and all bromine has been expelled. Remove the crucible, washing it with water. Add a few drops of methyle red, and render the solution alkaline with ammonium hydroxide (1:1). Boil the solution for one or two minutes, filter and wash with hot water. To the filtrate add 5-cc of hydrochloric acid (1:), adjust the volume to about 200-cc, bring the solution to boiling, and, while boiling, add 10-cc of hot 10 percent barium chloride solution. Allow to stand over night, filter, wash with hot water, ignite, and weigh at BaSO.

F-3c. Shot content.—Ten grams of wool are broken up as fine from the gas supply in the sintering and igniting of the mixture. If a sample contains barium sulphate, the sulphur so combined would not be included in the final result. If either barium compounds are present in the sample some sulphur might be removed as barium sulphate.

Note.—Care should be taken to avoid taking up sulphur compound as possible by hand, over a no. 28 mesh screen having a no. 50 mesh screen and pan underneath. Breaking up the wool facilities the separation of the shot, and the wool can be picked out readily. The material remaining after the wool is picked out is screened by hand, and all the wool remaining on the no. 28 and no. 50 mesh screens is picked off. The fine splinters and dust are aspirated, and the remainder on the no. 28 and no. 50 mesh screens is combined and weighed as the shot content.

G. PACKAGING, PACKING, AND MARKING FOR SHIPMENT

G-1. *Packaging.*—Unless otherwise specified, commercial packages are acceptable under this specification.

G-2. *Packing.*—Unless otherwise specified, the subject commodity shall be delivered in standard commercial containers, so constructed as to insure acceptance by common or other carrier, for safe transportation at the lowest rate, to the point of delivery.

G-3. *Marking.*—

G-3a. *Individual pieces.*—Each layer of type A covering shall be marked, labeled, or tagged to show the pipe size for which intended.

G-3b. *Shipping containers.*—Unless otherwise specified, shipping containers shall be marked with the name of the material, the type, pipe size, and quantity contained therein, as defined by the contract or order under which shipment is made, the name of the contractor, and the number of the contract or order.

H. NOTES

H-1. Requests and requisitions, and special specifications, should specify the type and size desired, also the weight of cotton jacket when a jacket heavier than 4 ounces per square yard is required.

H-2. The right is reserved to reject any bids on brands of rock-wool pipe covering and cement which have not been subjected to the required tests and found satisfactory. The attention of manufacturers is called to this requirement, and they are urged to forward samples of the pipe covering or cement which they propose to offer to the Navy in the future in order that tests may be made. These tests will be conducted at the expense of the manufacturers. Information with reference to the expense involved and as to where the samples should be sent will be supplied upon application to the Bureau of Supplies and Accounts. It is to be understood that the manufacturers shall pay all transportation charges to and from the point where tests are made. In the case of failure of the sample or samples submitted to prove satisfactory, consideration will be given to the requests of the manufacturers for additional tests only after it has been clearly shown that changes have been made in the product with reference to the method of manufacture, etc., which the Bureau concerned considers sufficient to warrant conducting such additional tests.

H-3. Copies of Navy Department specifications may be obtained upon application to the Bureau of Supplies and Accounts, Navy Department, Washington, D.C., except that naval activities should make application to the commandant, Navy Yard, New York, N.Y. When requesting, refer to specification by both title and number.

REFERENCES:

Eng. JJ-32P5 (9-12-Ds), Sept. 13 and Oct. 21, 1933.

Navy Department Specifications Board 32-P-5, Sept. 18, 1933.

C. & R. L2/JJ-32P5 (S) N/C, Sept. 26, 1933.

Ord. L2-1 (4166) (Dm9-4), Oct. 2, 1933.

Y. & D. JJ-32P5, Oct. 6, 1933.

Aer. Aer-D-158-EC, JJ32P5 (NDS), Oct. 11, 1933.

S. & A. L2/JJ-32P5.